

Docketed:

April 26, 1993

Entry Date

Proceedings and Orders

Apr 26 1993	Motion for leave to file and bill of complaint filed.
Jun 24 1993	Brief in opposition to motion for leave to file Bill of Complaint filed.
Jun 30 1993	DISTRIBUTED. September 27, 1993
Aug 23 1993	Reply brief filed.
Sep 15 1993	Motion of New York for leave to file a sur-reply brief and sur-reply brief filed.
Oct 4 1993	ORDER: The motion of New York for leave to file a sur-reply brief is denied. The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Feb 18 1994	Supplemental brief on New Jersey FILED.
Apr 26 1994	DISTRIBUTED, May 13, 1994.
Apr 28 1994	Brief for the United States as amicus curiae filed.
May 11 1994	Second supplemental brief of New Jersey filed.
May 16 1994	ORDER: The motion for leave to file a bill of complaint is granted. Defendant is allowed 60 days to file an answer.
Jul 15 1994	Answer to complaint filed.
Oct 11 1994	ORDER: It is ordered that Paul Verkuil, Esquire, of Heathrow, Florida, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic and clerical assistants, the cost of printing his report and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.
Oct 19 1994	Oath of Special Master filed.
Feb 23 1995	Motion of City of New York, et al. for leave to intervene as party defendants.
Mar 13 1995	Response of New Jersey received. (NP)
Mar 14 1995	Response of State of New York received. (NP)
Mar 20 1995	ORDER: The motion of the City of New York for leave to intervene as a party defendant is referred to the Special Master.
May 1 1995	Report of Special Master on motion of City of New York to intervene received. (NP)
May 22 1995	ORDER: The Report of the Special Master is received and

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	ordered filed. The motion of the City of New York to intervene as a party defendant is denied.
Jun 1 1995	Motion of Special Master for compensation and reimbursement of expenses filed. (NP)
Jun 7 1995	DISTRIBUTED. (June 9, 1995 Conf.)
Jun 12 1995	ORDER: The motion of the Special Master for compensation and reimbursement of expenses is granted and the Special Master is awarded a total of \$84,531.74 to be paid by the parties equally.
Nov 21 1995	Motion to the Special Master for Compensation and Reimbursement of Expenses filed (NP)
Dec 11 1995	ORDER: The motion of the Special Master for compensation and reimbursement of expenses is granted and the Special Master is awarded a total of \$81,649.50 for the period June 1, 1995 through November 17, 1995, to be paid equally by the parties.
May 30 1996	Motion of the Special Master for Compensation and Reimbursement of Expenses (NP)
Jun 10 1996	ORDER: The motion of the Special Master for award of fees and expenses is granted and the Special Master is awarded a total of \$144,837.50 for the period November 18, 1995-May 15, 1996, to be paid equally by the parties.
Nov 25 1996	Motion of Special Master for fees and expenses filed. (NP)
Nov 26 1996	DISTRIBUTED. (Dec. 13, 1996)
Dec 16 1996	ORDER: The motion of the Special Master for compensation and reimbursement of expenses is granted, and the Special Master is awarded a total of \$255,157.62 for the period May 15, 1996, through November 15, 1996, to be paid equally by the parties.
Mar 31 1997	Final Report of the Special Master received.
May 27 1997	DISTRIBUTED (June 12, 1997).
May 30 1997	Supplement to Report of Special Master received. Designated survey and two additional surveys lodged by Special Master.
Jun 16 1997	The Report of the Special Master and the Supplement are received and order filed. Exceptions to the Report may be filed within 45 days. Replies, if any, may be filed within 30 days.
Jun 18 1997	Motion of New York for leave to file exceptions in excess of the page limitations filed.
Jun 18 1997	Petition of Special Master for compensation and reimbursement of expenses filed.
Jun 23 1997	Distributed. (June 26, 1997)
Jun 25 1997	Motion of City of New York for leave to file a brief as amicus curiae in excess of the page limitations filed.
Jun 27 1997	The motion of the Special Master for compensation and reimbursement of expenses is granted, and the Special Master is awarded a total of \$263,488.89 to be paid equally by the parties. The motion of New York for leave

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Proceedings and Orders

to file Exceptions in excess of the page limitations is denied. The motion of the City of New York for leave to file a brief as amicus curiae in excess of the page limitations is denied.

Jul 30 1997 Brief of City of New York as amicus curiae filed.

Jul 31 1997 Exceptions of New Jersey filed.

Jul 31 1997 Motion of New York Landmarks Conservancy, et al. for leave to file a brief as amici curiae filed.

Jul 31 1997 Motion of New York Historical Society, et al. for leave to file a brief as amici curiae filed.

Jul 31 1997 Exceptions of New York filed.

Jul 31 1997 Motion of National Trust for Historic Preservation in the United States, et al. for leave to file a brief as amici curiae filed.

Aug 11 1997 Objections of New Jersey to briefs amici curiae in support of Exceptions of New York filed. (NP)

Aug 20 1997 Response of Proposed Preservation amici to objections of New Jersey to motion for leave to file brief as amici curiae filed. (NP)

Aug 21 1997 Response of Proposed Historian amici to objections of New Jersey for leave to file a brief as amici curiae filed. (NP)

Aug 21 1997 Response of Proposed New York Landmarks amici to objections of New Jersey to motion for leave to file a brief as amici curiae filed. (NP)

Aug 29 1997 Reply of New Jersey filed.

Aug 29 1997 Reply of New York filed.

Sep 2 1997 Brief of United States as amicus curiae filed.

Sep 15 1997 X Motion of New York for leave to file sur-reply brief and sur-reply brief in support of exceptions filed.

Sep 29 1997 The motion of National Trust for Historic Preservation in the United States, et al. for leave to file a brief as amici curiae is granted. The motion of New York Landmarks Conservancy, et al. for leave to file a brief as amici curiae is granted. The motion of New York Historical Society, et al. for leave to file a brief as amici curiae is granted. The Exceptions to the Report of the Special Master are set for oral argument in due course. The Motion of New York for leave to file a sur-reply brief is denied.

Oct 3 1997 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Oct 14 1997 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Oct 29 1997 Motion of Western Mohegan Tribe & Nation of New York for leave to file a brief as amicus curiae, out-of-time, filed.

Nov 3 1997 Scheduled for oral argument January 12, 1997, at 10 a.m.

Nov 10 1997 Opposition of New Jersey to motion of Western Mohegan for

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Nov 17 1997	leave to file a brief as amicus curiae filed. (NP) Reply of Western Mohegan to objections of New Jersey filed (NP).
Dec 1 1997	Motion of Western Mohegan Tribe & Nation of New York for leave to file a brief as amicus curiae is denied.
Dec 10 1997	CIRCULATED.
Dec 17 1997	Motion of Western Mohegan Tribe & Nation for reconsideration of order denying leave to file a brief as amicus curiae filed.
Jan 12 1998	ARGUED.
Jan 12 1998	Motion of Western Mohegan Tribe and Nation of New York for reconsideration of order denying leave to file a brief as amicus curiae is denied.
Jan 14 1998	Record of proceedings before Special Master, and Index, received.

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OFFICE OF THE CLERK

No. ____ Original

In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**MOTION FOR LEAVE TO FILE COMPLAINT,
COMPLAINT AND BRIEF IN SUPPORT OF
MOTION FOR LEAVE TO FILE COMPLAINT**

ROBERT J. DEL TUFO
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JACK M. SABATINO
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No. ____ Original

In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

Comes now the State of New Jersey, by and through the Attorney General of the State of New Jersey, Robert J. Del Tufo, and respectfully asks leave of the Court to file its Complaint against the State of New York, submitted herewith.

ROBERT J. DEL TUFO
Attorney General

April 23, 1993
Please address all
communications to:

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
NO. ____ ORIGINAL
COMPLAINT

STATE OF NEW JERSEY,)	
)	
Plaintiff,)	
)	
v.)	
)	
STATE OF NEW YORK,)	
)	
Defendant.)	

Comes now the State of New Jersey, by and through its Attorney General, and brings this suit against the Defendant, the State of New York, and for its cause of action states:

A. Jurisdiction and the Pressing Need for the Court to Address This Controversy.

1. The original and exclusive jurisdiction of this Court is invoked pursuant to Art. III, Sec. 2, Clause 2 of the Constitution of the United States, and 28 U.S.C. §1251(a). *Mississippi v. Louisiana*, 506 U.S. ___, 113 S.Ct. 549, 121 L.Ed. 2d 466 (1992).

2. The original and exclusive jurisdiction of this Court is invoked in order to resolve this State boundary dispute between the State of New Jersey and the State of New York regarding Ellis Island in the Hudson River between New York and New Jersey. In 1834, when the

boundary between New Jersey and New York was fixed, Ellis Island was approximately three acres in size. Underwater land surrounding the island was artificially filled after 1834, and Ellis Island presently consists of approximately 27.5 acres of land. New Jersey claims that all portions of Ellis Island that were created by the artificial filling after 1834 are within the territory of and are subject to the governmental jurisdiction of New Jersey. New York claims that the whole of Ellis Island is within its territory and subject to its jurisdiction.

3. There is a pressing need for the prompt and final settlement of this controversy. Because under 28 U.S.C. §1251(a) this Court has original and exclusive jurisdiction over controversies between two States, this is the only court with jurisdiction to resolve the dispute between New Jersey and New York concerning their common border. Resolution of the controversy is essential because in 1992 the Court of Appeals for the Second Circuit issued its opinion in *Collins v. Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992), holding in the context of a workers compensation action that the law of New York would be applied to resolve a contribution claim for damages sustained on the filled portions of Ellis Island. Although the Court of Appeals for the Second Circuit does not have jurisdiction to resolve the dispute between New Jersey and New York concerning its common border, the decision of that court in *Collins v. Promark Products, Inc.*, *supra*, reflects a determination that the whole of Ellis Island, including the lands artificially filled after 1834, is within the territory of New York and subject to its governmental jurisdiction. This decision was erroneous and is being improperly relied upon by the State of New York

to expand its governmental authority over the filled portions of the island. For example, on or about November 10, 1992, the Landmarks Preservation Commission of the City of New York held hearings on the question of whether the whole of Ellis Island should be declared a city landmark. In taking that action, the Commission is relying upon extending the *Collins* decision to all matters involving state jurisdiction over the entire island.

4. The need for immediate resolution by the Court of the boundary dispute concerning Ellis Island is further exemplified by the current development proposals for the island. The National Park Service plans to act under the National Historic Preservation Act, 16 U.S.C. §470(f), and present for public comment in the near future plans by the Center Development Corporation of New York for the renovation of three existing buildings on the filled area of the island. The buildings will be designed to house graduate students and professors for certain colleges and universities within the City of New York in New York State. The renovations are to be financed by the proceeds of bonds issued by the Dormitory Authority of the State of New York. The Center intends to use the money generated by the dormitories to build an international scholastic center at other renovated buildings on the island. The Authority is limited by statute to projects in New York State under the Dormitory Authority Act, N.Y. Public Authorities Law §1675 *et seq.* (McKinney 1981), and having a part in this development would be a violation of this law. The proposal constitutes an unwarranted extension of the decision in *Collins*, which in any event was erroneous, and is contrary to New Jersey sovereignty over the filled portion of the island.

B. The Historical and Legal Origins of New Jersey's Sovereignty Over Ellis Island.

5. Following a long-standing dispute between the States of New Jersey and New York concerning their common water boundary, Commissioners representing both States on September 16, 1833 entered into a Compact to define the jurisdictional and territorial limits of each State, *inter alia*, in New York Harbor ("The Compact"). The Compact was ratified by the State of New Jersey on February 26, 1834, N.J.Stat.Ann. 52:28-1, by the State of New York on February 5, 1834, N.Y. State Law §7, and by the United States on June 28, 1834, c. 126, 4 Stat. 708.

6. Article I of the Compact, as codified in both States' statutes, established the boundary line between the states at a point in the middle of the Hudson River and New York Bay, with New York to the east and New Jersey to the west of that line:

Article I. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned. [4 Stat. 709.]

7. Ellis Island in the Bay of New York is situated well to the west of the middle line of the Hudson River, and would therefore be, pursuant to Article I, within the territory and under the jurisdiction of the State of New

Jersey. However, Article II of the Compact provides an exception to Article I, and states that Ellis Island will nevertheless continue under the then "present" jurisdiction of the State of New York:

Article II. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state. [4 Stat. 709.]

8. Before the approval of the Compact, New York State had ceded jurisdiction of Ellis Island to the United States Government, subject only to New York State's ability to serve any process, civil or criminal, on the island, at that time called Oyster Island. Laws of New York of 1800 c. 6, p. 454, passed February 15, 1800. New York conveyed its title to the island to the United States on June 28, 1834. At that time, Ellis Island was approximately three acres in size. The submerged tidal lands west of the middle of the Hudson River, including the lands under water immediately adjacent to Ellis Island were lands of the State of New Jersey, its property under common law, and subject to its sovereign jurisdiction pursuant to Article I of the Compact, subject only to the jurisdiction of the State of New York over those waters for police purposes to protect and advance the interests of the New York port.

9. After the Civil War, the United States War Department determined that the military installation then in operation was no longer required at Ellis Island. In 1890, it transferred the island to the Treasury Department for its use as an immigration station. Between 1890 and 1934 the United States Government undertook several

landfill projects by which the size of Ellis Island enlarged ninefold from its original, natural size of approximately three acres as it existed at the time of the 1834 Compact, to approximately 27.5 acres, to accommodate the new use.

10. The submerged lands around the original approximately three-acre island were recognized as the lands within the territory and sovereignty of the State of New Jersey by the United States Government when in 1904 it purchased the title to these tidal submerged lands from the State of New Jersey. A State tidelands "grant" or deed was delivered to the United States Government pursuant to N.J.Stat.Ann. 12:3-1 *et seq.*, on November 30, 1904. The "grant" or deed recites that the conveyed submerged tidal lands of the Hudson River are "in the Bay of New York in the County of Hudson, and State of New Jersey." These were the lands that were filled and developed between 1890 and 1934 by the United States Government for the immigration facility on Ellis Island. The 1904 application for a tidelands "grant" or deed by the United States Government from the State of New Jersey was reported by the *New York Times*, July 19, 1904. The *Times* stated, "The chief interest in the application lies in the fact that it is a recognition of the claim that New Jersey and not New York owns the submerged lands in the vicinity of Ellis Island." The original natural island has sometimes been referred to as "Island No. 1", while the filled lands on Ellis Island have sometimes been referred to as "Island No. 2" and "Island No. 3" by the employees on the island and by the United States Government.

11. The State of New Jersey at no time has ceded its territorial sovereignty and jurisdiction over the approximate 24.5 acres of filled lands surrounding the original,

natural three-acre Ellis Island to the United States or to the State of New York. Under the rules of law governing state boundaries along navigable waters as articulated by this Court, the artificial filling of a submerged bed and channel, *i.e.*, an artificial avulsion, does not change the location of a state's boundary.

12. The State of New Jersey and the State of New York presently have a dispute concerning which state has jurisdiction over the approximate 24.5 acres of filled land of Ellis Island for the purposes of taxation, zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and public welfare laws, civil and criminal law, and for all other purposes related to the jurisdiction of any state.

C. Repeated Assertions of New Jersey's Sovereignty Over Ellis Island

13. The State of New Jersey and its citizens have publicly asserted the sovereignty claim of the State of New Jersey to the filled portion of Ellis Island many times over the years after 1904, including, but not limited to, the following:

(a) The City of Jersey City, in the County of Hudson, in the State of New Jersey has, during the entire period, carried Ellis Island on its tax rolls as assessed property within its boundaries, although with a tax exempt status, as owned by the United States Government.

(b) On or about August 3, 1934, the Bricklayers, Masons, and Plasterers International Union Local 10 in Jersey City asserted that New Jersey had jurisdiction over the filled

portion of Ellis Island in conjunction with the construction of several buildings on the island. The claim was made in a letter to United States Representative Mary T. Norton. Congresswoman Norton thereupon wrote to the Administrator of the Public Works Administration, Harold L. Ickes, to object to the barring of workers from New Jersey unions from working on a public works project on Ellis Island. The United States Government decided that employment on Ellis Island would be divided between workers from New Jersey and those from New York. Congresswoman Norton, in her letter to Administrator Ickes, was reported as saying that inasmuch as Ellis Island is located partly on New Jersey land, and is, in fact, closer to New Jersey than New York, it is only just that unemployed New Jersey men should be allowed to work on the project.

(c) In mid-July 1955, the New Jersey Commissioner of Conservation and Economic Development, Dr. Joseph E. McLean, wrote to Walter F. Downey, Regional Director of the United States General Services Administration, and asserted that Ellis Island lay within the geographical limits of the State of New Jersey. The letter was reported in the *New York Times*, July 21, 1955.

(d) On July 30, 1955, H.R. 3120, a bill authorizing the appointment of a New York City National Shrines Advisory Board, was considered by the U.S. House of Representatives. During the debate on that bill, Representative Thomas J. Tumulty of New Jersey stated, "I am not going to prolong the discussion, but Jersey City claims that Ellis Island is within the confines of Jersey City." *Congressional Record*, July 30, 1955, at 12387. His objection to the bill

blocked its passage in the House at that time. A companion bill, S.732, was considered on August 1, 1955. Representative George Klein of New York responded to Congressman Tumulty's objection, and stated that New Jersey residents would be allowed to serve on the proposed Board. *Congressional Record*, August 1, 1955, at 12703. Congressman Tumulty withdrew his reservation of objection, and the bill thereupon passed. The bill was approved August 11, 1955. Pub.L. No. 341 c. 779, 69 Stat. 632.

(e) On January 4, 1956, 25 New Jersey State and County officials inspected Ellis Island as part of their efforts to reassert New Jersey's claims to the island. Leading the contingent were the New Jersey State Commissioner of Conservation and Economic Development, Joseph B. McLean, City of Jersey City Mayor Bernard J. Berry, New Jersey State Senator James F. Murray, Jr. and New Jersey State Senator Richard Stout. The New Jersey group was taken to the island aboard the Coast Guard cutter *Tuckahoe*. They received a two-hour inspection tour from the federal employees on the island. The inspection by New Jersey officials was reported in the *New York Times*, January 5, 1956. Representative Irwin D. Davidson of New York commented on this inspection tour and New Jersey's claim of jurisdiction over Ellis Island. He did so in an Extension of Remarks reprinted in the *Congressional Record*, March 7, 1956 at 4244. In October 1962, City of Jersey City Mayor Thomas Gangami also made a trip to Ellis Island in order to claim it for New Jersey.

(f) On January 2, 1958, New Jersey State Senator James F. Murray, Jr. telegraphed United States Senators Alexander Smith and Clifford P. Case and United States Congressional Representatives Alfred D. Simiensi and Vincent J. Dellay to assert that the City of Jersey City had legal jurisdiction over Ellis Island. The action was reported in the *New York Times*, January 3, 1958.

(g) The Council of State Governments attempted to arrange a meeting between representatives of New Jersey and New York over the jurisdiction of either State on Ellis Island. The date set was August 8, 1960. New York State Senator Elisha T. Barrett, Chairman of the New York Commission on Interstate Cooperation, advised New Jersey that New York would not participate. He asserted that New York would have jurisdiction over Ellis Island if the United States Government disposed of the island. New Jersey State Commissioner of Conservation and Economic Development Salvatore A. Bontempo replied that Ellis Island was clearly in New Jersey, and stated that New York was confusing ownership with jurisdiction. The proposed meeting and the exchange between New Jersey and New York state officials was reported in *The Newark News*, July 22, 1960.

(h) On December 6, 1962, the City of Jersey City, through its Corporation Counsel, Meyer Pesin, asserted the interests of the City in the filled portion of Ellis Island during three days of hearings on the disposal of Ellis Island before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations of the United States Senate. During his testimony he stated that, "Jersey City may well claim preemptive governmental jurisdiction over Ellis Island . . . [.] To put it

simply, in other words, the city of Jersey City may look upon Ellis Island as within the proper boundaries of the city and subject to its jurisdiction." (Transcript, p. 123). Much of the discussion by those who testified concerned "the question of jurisdiction over the island between the States of New York and New Jersey." United States Senator Edmund S. Muskie, Chairman, so framed the issue on the first day. (Transcript p. 20). A Mr. Eugene J. Morris, who testified on behalf of the development of a senior citizen center on the island, stated that either a bi-state compact or an appeal to the United States Supreme Court would resolve the matter, which he stated, "is at the moment totally unresolved." (Transcript p. 25). United States Senator Kenneth B. Keating of New York recognized the existence of the dispute and submitted a memorandum from the Library of Congress on the issue. (Transcript p. 64). The Honorable Robert F. Wagner, Mayor of New York City and Congressman Leonard Farbstein also spoke in favor of the position of the State of New York.

(i) On September 5, 1963, the City of Jersey City enacted a zoning ordinance applicable to Ellis Island which would control any development on the island if it were sold to private interests, as was proposed by some who testified before the Subcommittee on Intergovernmental Relations in the hearings on the disposal of Ellis Island. The ordinance was reprinted in *Discussion on the Disposal of Ellis Island before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, United States Senate 88 Congress 1st Session, September 4, 1963 at pages 21 to 25. (Committee Print 1963).*

(j) The sovereignty and jurisdiction of the State of New York and the State of New Jersey over Ellis Island was the subject of a complaint entitled *Frank J. Guarini et als. v. The State of New York and the State of New Jersey* filed in the Superior Court of New Jersey, Chancery Division, Hudson County on November 9, 1984 and removed to the United States District Court for the District of New Jersey. There, the State of New Jersey first filed an Answer dated January 9, 1985. The State of New Jersey admitted the Plaintiffs' factual allegations in the Third Count, paragraph 2 of the Complaint which were as follows:

2. The landfill and accretions to Ellis Island, consisting of approximately 24.5 acres, fall within the territorial jurisdiction and the sovereignty of the defendant State of New Jersey under the terms of the compact of 1834.

The position of the State of New Jersey during that litigation was consistent with the Plaintiffs' allegation in paragraph 2 of the Complaint. The federal district court remanded the action to the state court. The litigation was dismissed upon the ground that only the United States Supreme Court has jurisdiction to decide the boundary issues between states. *Guarini v. State of New York*, 215 N.J. Super. 426, 521 A.2d 1362 (Chan. Div. 1986), *aff'd*, 215 N.J. Super. 293, 521 A.2d 1294 (App. Div. 1986), *certif. den.* 107 N.J. 77, 526 A.2d 157 (1987) *cert. den.*, 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 34 (1987). The State of New York was a party to the litigation.

(k) On June 23, 1986, Thomas H. Kean, Governor of the State of New Jersey, and Mario M. Cuomo, Governor of the State of New York, signed a Memorandum of Understanding agreeing to divide the state and local taxes

collected on Ellis Island and Liberty Island equally and devote this revenue to relief for homeless persons of both States. The taxes involved include sales, income, and corporate taxes. Both Governors agreed to use their best efforts to have their legislatures approve the proposal. The agreement was incorporated into law by the State of New Jersey in 1987, N.J.Stat.Ann. 32:32-1 *et seq.* This agreement has not been incorporated into law by the State of New York. This agreement was, in any event, only a partial attempted resolution of this dispute.

(l) The State of New Jersey appeared as an *amicus curiae* asserting its jurisdictional and territorial rights over the filled portion of Ellis Island in the United States Court of Appeals for the Second Circuit in *Collins v. Promark Products, Inc., supra*. The State of New York appeared as an *amicus curiae* in support of its jurisdictional and territorial claims over the same filled land. The Court held that the law of the State of New York regarding workers compensation would apply to the litigation involving an accident which occurred on the filled portion of Ellis Island.

14. The State of New York has improperly claimed all of Ellis Island as part of its jurisdiction by including it as a noncontiguous part of the County of Manhattan in the State of New York for the purposes of United States Congressional districts, New York State Senate districts, New York State Assembly districts, and for other purposes.

15. The State of New Jersey has attempted on several occasions to negotiate an overall resolution of this

dispute with the State of New York. The 1986 Memorandum of Understanding and the approval of that agreement by the New Jersey Legislature are illustrative of those attempts. Such efforts have not been successful, and it appears highly unlikely that any comprehensive agreement as to this jurisdictional dispute can be reached.

16. New Jersey Attorney General Robert J. Del Tufo wrote to New York Attorney General Robert Abrams on January 8, 1993 reiterating New Jersey's jurisdictional and sovereignty claims over Ellis Island. The letter further indicated that the failure of the New York Legislature to adopt concurrent legislation as intended in the 1986 Memorandum of Understanding could result in the within action in this Court. Attorney General Abrams responded by letter dated February 8, 1993. He stated that New York Governor Mario M. Cuomo submitted bills essentially identical to New Jersey's implementing legislation to the New York Legislature on three separate occasions, in 1986, 1987 and 1988 "However, despite the Governor's active efforts, the Legislature declined to pass the bill in each of three successive years. Thus, Governor Cuomo has used his best efforts to secure enactment of the Liberty Trust Fund legislation." No proposals have been submitted to the Legislature by the Governor since 1988. At the same time, the staff of the State of New Jersey Historic Preservation Office has been advised that the National Park Service plans to present for public comment a proposal by the Center Development Corporation for the renovation of three existing buildings on the filled portions of Ellis Island. Center Development anticipates that financing of these renovations will be undertaken with the proceeds of bonds issued by the

Dormitory Authority of the State of New York. In addition, New York City is seeking to have the entire island declared a New York City landmark. Because of the New York Legislature's failure to enact legislation to implement the Memorandum of Understanding, and because of other actions taken by the State of New York to advance New York's control of Ellis Island, the 1986 Memorandum of Understanding is a nullity, without any force and effect.

WHEREFORE, the State of New Jersey prays:

- (1) That process be issued against the State of New York and that the State of New York be required to answer this Complaint; and
- (2) That a decree be entered declaring the true and correct boundary line between the State of New Jersey and the State of New York on Ellis Island; and
- (3) That the boundary line be declared to be the former mean high water line of the original natural island, approximately 3 acres in size, so that the original island is thereby declared to be within the territory and jurisdiction of the State of New York, and so that the balance of the island, approximately 24.5 acres in size, and the surrounding waters, are thereby declared to be within the territory and jurisdiction of the State of New Jersey; and
- (4) That this Court issue a permanent injunction prohibiting the State of New York from enforcing its laws or asserting its jurisdiction within the filled portions of Ellis Island; and

(5) For such other and further relief as this Court may deem to be proper.

ROBERT J. DEL TUO
Attorney General of New Jersey

JACK M. SABATINO
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April 23, 1993

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No. ____ Original

In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE COMPLAINT**

ROBERT J. DEL TUFO
Attorney General
State of New Jersey

Richard J. Hughes Justice Complex
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Attention: Joseph L. Yannotti
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QUESTION PRESENTED

Whether the Court should permit the State of New Jersey to invoke its original jurisdiction and file a complaint against the State of New York to resolve the long-standing dispute between the states concerning their mutual border on Ellis Island in the Hudson River and Upper New York Bay, where New Jersey's sovereignty over the filled portions of Ellis Island is consistent with the Compact made between the states and ratified by Congress in 1834, and where the Court's resolution will facilitate plans for commercial development and settle attendant controversies over taxation, zoning, and the state civil and criminal laws and regulations applicable on the Island?

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No. ____ Original

In The
Supreme Court of the United States

October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE COMPLAINT**

JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States and under Title 28, United States Code, Section 1251(a).

**CONSTITUTIONAL PROVISION AND
STATUTES INVOLVED**

United States Constitution, Art. III, §2, cl. 2

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

28 U.S.C. 1251(a), Original Jurisdiction

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

4 Stat. 708, the 1834 Compact between New Jersey and New York (see Appendix).

STATEMENT OF FACTS

This is a suit under the Court's original and exclusive jurisdiction seeking to resolve a long-standing dispute between the State of New Jersey and the State of New York as to the location of their common boundary on Ellis Island, in the Hudson River and in Upper New York Bay.

Ellis Island is best known as the gateway through which millions of immigrants entered the United States of America beginning at the turn of the century. Between 1892 and 1954, 17,000,000 immigrants were admitted to the United States through Ellis Island. *Collins v. Promark Products, Inc.*, *supra*, 956 F.2d at 385 n.1. Although there were a number of cities on all three American coasts through which immigrants passed, so busy was Ellis Island at that time that it has been estimated that the ancestors of 40% of all Americans came through Ellis Island. *Id.*, at 384.

The island is now part of the Statue of Liberty National Monument, and has been partially restored. The Second Circuit Court of Appeals referred to the island as "a shrine to the nation's immigrant history and ethnic diversity." *Id.*, at 384. The restoration of the Great Hall on Ellis Island, through which all of these immigrants

passed, represents "the largest historic renovation project in the history of the United States." *Id.*, at 385 n.1.

The genesis of the present controversy is the Compact of 1834, a boundary agreement between New Jersey and New York covering their border on the Hudson River, in New York Harbor, and in Raritan Bay. That Compact was itself a resolution of a dispute between the two states which was by then nearly two centuries old. In advancing their boundary positions both sides argued from the royal grants which first created the two colonies.

A. Colonial Antecedents Leading to the Dispute Over the Common Boundary Between the States

It is therefore accurate to say that New Jersey's boundary dispute with New York along the Hudson River and the Bay of New York began with the founding documents of English rule in this part of North America. On March 12, 1664, King Charles II (1630-1685) made a grant of a portion of the lands the Dutch had called New Netherlands to his brother James, Duke of York (1633-1701). James, Duke of York, would rule as James II between 1685 and 1688. The grant from Charles II to the Duke of York arguably included the entire Hudson River. The lands it involved were conveyed . . .

. . . together also with the said river called Hudson's river. . . . [as quoted in a letter from Ezra L'Hommedieu *et als.*, Commissioners of New York to the Commissioners of New Jersey dated September 28, 1807, reprinted in *Report of the Commissioners on the Controversy with the*

State of New York Respecting the Eastern Boundary of the State of New Jersey p.5 (Trenton 1807).]

James, Duke of York conveyed part of the lands he received from Charles II to John, Lord Berkeley, and Sir George Carteret (c.1610-1680) on June 23 and June 24 in 1664. This grant arguably did not include the Hudson River and did include Staten Island. It conveyed

. . . all that tract of Land . . . westward of Long-Island and Manhattan's Island, and bounded on the east part by the main sea, and part by Hudson's river. . . . [*Id.*, p.6]

According to New York, in its discussions with the New Jersey Commissioners, these two documents were consistent as to the title to the Hudson River. The entire river was conveyed to the Duke of York, so the contention went. When he conveyed out a portion of his new lands to Berkeley and Carteret in 1664, this portion was only bounded on the east by the River, but did not include it. Thus, the Hudson River assertedly remained as part of the colony of New York, and remained part of New York when it became a state. Indeed, this position extended in the early 1800's not only to a claim of sovereignty by New York to the river as it then existed, but also to the original mean low water line on the New Jersey side. Even by then there had been some filling in of the Hudson River, and of the tidemarsh of what later became downtown Jersey City. By virtue of the colonial grants, New York claimed jurisdiction to the filled-in lands on the New Jersey side of the Hudson River, and to the roads and wharfs that were built there.

New Jersey responded that it was a co-equal colony and a sovereign state for which access to and jurisdiction

over half of the Hudson River was economically vital. The middle line of the river was the only proper boundary under the law of nations and the reasonable interpretation of the documents in context, according to New Jersey. Thus, New Jersey's argument with respect to the Hudson River was not based upon a strict interpretation of prior grant instruments.

New York reliance upon the strict interpretation of those same documents in support of its claim of dominion over Staten Island was far less persuasive. The Duke of York's grant to Berkeley and Carteret, upon which New York so heavily relied as to its claim to all of the Hudson River, identified the lands granted as being "west of Manhattan's Island and bounded on the east part by the main sea and in part by Hudson's River." [*Id.*, p.6]. To those in New Jersey, that description included Staten Island as part of New Jersey, because Staten Island is west of Manhattan and is bounded on the east by the main sea, which New Jersey read as what is now Upper New York Bay, the Narrows and Lower New York Bay. In support of its argument for jurisdiction over Staten Island, New York was forced to argue that the Hudson River did not end at Bedloe's Island, but then continued west and south through the much narrower Kill Van Kull and the Arthur Kill to Raritan Bay, thus including Staten Island in New York. The "main sea" did not begin, in this view, until well beyond Sandy Hook. Beyond the terms of the documents, New Yorkers argued Staten Island was theirs as a result of uninterrupted and unchallenged possession from earliest colonization. Thus, New Jersey had as reasonable a claim to Staten Island as New York had to

the Hudson River. Accordingly, it was appropriate to convene negotiators from both states.

B. Negotiations Between the States Concluding in the Compact of 1834

In 1806 and in 1826 commissioners appointed by both states attempted to resolve the ambiguities left by the royal grants. New York applied pressure on New Jersey during this period by arresting and jailing a ship's captain for docking in Perth Amboy, New Jersey in violation of New York law. New Jersey thereupon jailed the Sheriff of Staten Island, New York who made the Perth Amboy arrest for serving process within New Jersey. New Jersey enacted a law setting the boundary between the two states as the middle of the Hudson River. Laws of New Jersey of 1807, c. 3, p. 18. New York then enacted a law during the negotiations setting its boundary along the west shore of the Hudson River at the low water mark, thus claiming jurisdiction over the entire river. New Jersey responded by filing suit in this Court to set the boundary between the States. Thereupon, for a third time, commissioners from both states met in 1833.

This time the negotiations were successful. Commissioners representing both states entered into a Compact on September 16, 1833, to define the jurisdictional and territorial limits of each state, *inter alia*, in New York Harbor. Essentially New York received Staten Island and the other islands in the Hudson River, including Ellis Island, and New Jersey received half of the Hudson River as it existed in 1834. The Compact was ratified by the State of New Jersey on February 26, 1834, N.J.Stat.Ann.

52:28-1, by the State of New York on February 5, 1834, N.Y. State Law §7, and by the United States on June 28, 1834, c. 126, 4 Stat. 708. See generally, as to the history and background to the Compact of 1834, Parker, James, "A Brief History of the Boundary Dispute Between New York and New Jersey" *Proceedings of the New Jersey Historical Society*, VIII, 1856-1859, pages 106-109. Mr. Parker was the only person who was a Commissioner at all three periods of negotiations between the two states.

Article I of the Compact established the boundary line between the states at a point in the middle of the Hudson River and New York Bay, with New York to the east and New Jersey to the west of that line:

Article I. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned. [4 Stat. 709.]

Ellis Island in the Bay of New York is well to the west of the middle line of the Hudson River, and would therefore be, pursuant to Article I, within the territory and under the jurisdiction of the State of New Jersey. Article II of the Compact is in the nature of an exception to Article I, and provides that Ellis Island would nevertheless continue under the then present jurisdiction of the State of New York:

Article II. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state. [4 Stat. 709.]

Before the approval of the Compact, New York State had ceded jurisdiction of Ellis Island to the United States Government, subject only to New York State's ability to serve any process, civil or criminal, on the island, at that time called Oyster Island. Laws of New York of 1800, c. 6, p. 454, passed February 15, 1800. New York conveyed its title to the island to the United States on June 28, 1834, the same date as the Compact's approval in Congress. At that time, Ellis Island was approximately three acres in size. The submerged tidal lands west of the middle of the Hudson River, including the lands under water immediately adjacent to Ellis Island, were lands of the State of New Jersey, its property under common law, and subject to its sovereign jurisdiction pursuant to Article I, subject only to the jurisdiction of the State of New York over those waters for police purposes to protect and advance the interests of the New York port.

C. The Filling of Submerged Lands Around Ellis Island

After the Civil War, the United States War Department determined that the military installation then in operation there was no longer required at Ellis Island. In 1890, it transferred the island to the Treasury Department for its use as an immigration station. Between 1890 and 1934, the United States Government undertook several

landfill projects by which the size of Ellis Island was increased from the original, natural approximately three acres to approximately 27.5 acres to accommodate the new use.

The lands around the original three-acre island were recognized as the lands within the territory and sovereignty of the State of New Jersey by the United States Government when in 1904 it purchased the title to these tidal submerged lands from the State of New Jersey. A New Jersey State tidelands "grant" (or deed) was delivered to the United States Government pursuant to N.J.Stat.Ann. 12:3-1 *et seq.*, on November 30, 1904. The grant recites that the conveyed submerged tidal lands of the Hudson River were "... in the Bay of New York in the County of Hudson, and State of New Jersey." These were the lands that were filled and developed between 1890 and 1934, by the United States Government for the immigration facility on Ellis Island. The original natural island has sometimes been referred to as Island No. 1, by the employees on the island and by the United States Government, while the filled lands have sometimes been referred to as Islands No. 2 and 3 on Ellis Island.

D. The Current Dispute Over the Filled Portion of Ellis Island

As pleaded in the accompanying proposed Complaint, the State of New Jersey at no time has ceded its territorial sovereignty and jurisdiction over the 24.5 acres, approximately, of filled lands surrounding the original, natural 3-acre Ellis Island to the United States or to the State of New York.

The State of New Jersey and the State of New York presently have a dispute concerning which state properly has jurisdiction over the 24.5 acres, approximately, of filled land of Ellis Island, for the purposes of taxation, zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and public welfare laws, the imposition of civil and criminal law, and for all other purposes related to the jurisdiction of any state.

The State of New York has improperly claimed all of Ellis Island as part of its jurisdiction by including it as a noncontiguous part of the County of Manhattan in the State of New York for the purposes of United States Congressional districts, New York State Senate districts, New York State Assembly districts, and for other purposes.

E. New Jersey's Continued Assertions of Sovereignty Over the Filled Portion of Ellis Island

The State of New Jersey and its citizens have publicly asserted the sovereignty claim of the State of New Jersey to the filled portion of Ellis Island many times over the years after 1904, as evidenced by the following facts.

First, the City of Jersey City, Hudson County, New Jersey, has, during the entire period, from 1890 to the present, carried Ellis Island on its tax rolls as assessed property within its boundaries, although with a tax exempt status based on its ownership by the United States Government. Second, in 1934, New Jersey Congresswoman Mary T. Norton wrote to the Administrator of the federal Public Works Administration, Harold L.

Ickes, to object to the barring of workers from New Jersey unions from working on a public works project on Ellis Island. Congresswoman Norton based her objection on Ellis Island's partial location on New Jersey land and on the Island's closer proximity to the New Jersey mainland than to the New York mainland. In response to Norton's objection, the United States Government decided that employment on Ellis Island would be divided between workers from New Jersey and those from New York.

Next, in mid-July 1955, the New Jersey Commissioner of Conservation and Economic Development, Dr. Joseph E. McLean, wrote to Walter F. Downey, Regional Director of the United States General Services Administration, and asserted that Ellis Island lay within the geographical limits of the State of New Jersey. In addition, during that same year, United States Representative Thomas J. Tumulty objected to a federal bill authorizing the appointment of a New York City National Shrines Advisory Board on the basis of Jersey City's claims to Ellis Island. *Congressional Record*, July 30, 1955, at 12387. This objection to the bill blocked its passage until United States Representative George Klein of New York responded to the objection by stating that New Jersey residents would be allowed to serve on the proposed Board. *Congressional Record*, August 1, 1955, at 12703.

During the following year, on January 4, 1956, 25 New Jersey State and County officials inspected Ellis Island as part of their ongoing efforts to reassert New Jersey's claims to the island. The contingent was led by Joseph B. McLean, New Jersey State Commissioner of Conservation and Economic Development, and by City of Jersey City Mayor Bernard J. Berry, New Jersey State

Senator James F. Murray, Jr. and New Jersey State Senator Richard Stout. The New Jersey group was taken to the island aboard the Coast Guard cutter *Tuckahoe* and received a two-hour inspection tour from the federal employees on the island; the inspection by New Jersey officials was reported in the *New York Times* on January 5, 1956. Representative Irwin D. Davidson of New York commented on this inspection tour and New Jersey's claim of jurisdiction over Ellis Island. He did so in an Extension of Remarks reprinted in the *Congressional Record*, March 7, 1956 at 4244. In October, 1962, City of Jersey City Mayor Thomas Gangami also made a trip to Ellis Island in order to claim it for New Jersey.

On January 2, 1958, New Jersey State Senator James F. Murray, Jr. telegraphed United States Senators Alexander Smith and Clifford P. Case and United States Congressional Representatives Alfred D. Simiensi and Vincent J. Dellay to assert that the City of Jersey City had legal jurisdiction over Ellis Island. The action was reported in the *New York Times* on January 3, 1958.

The Council of State Governments subsequently attempted to arrange a meeting between representatives of New Jersey and New York over the jurisdiction of either State on Ellis Island and the date of August 8, 1960 was set for the meeting. However, New York State Senator Elisha T. Barrett, Chairman of the New York Commission on Interstate Cooperation, then advised New Jersey that New York would not participate and he asserted that New York would have jurisdiction over Ellis Island if the United States Government disposed of the island. New Jersey State Commissioner of Conservation and Economic

Development, Salvatore A. Bontempo replied to this assertion by stating that Ellis Island was clearly in New Jersey and that New York had confused ownership with jurisdiction. The proposed meeting and the exchange between New York and New Jersey State officials was reported in *The Newark News* on July 22, 1960.

Two years later, on December 6, 1962, the City of Jersey City, through its Corporation Counsel, Meyer Pesin, asserted the interests of the City in the filled portion of Ellis Island during three days of hearings on the disposal of Ellis Island before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations of the United States Senate. During his testimony, Pesin stated that "Jersey City may well claim preemptive governmental jurisdiction over Ellis Island . . . [.] To put it simply, in other words, the city of Jersey City may look upon Ellis Island as within the proper boundaries of the city and subject to its jurisdiction." (Transcript, p. 123). In addition, much of the other hearing testimony also concerned the question of jurisdiction over the island between the States of New York and New Jersey, and United States Senator Edmund S. Muskie, Chairman, explicitly recognized this issue on the first hearing day. (Transcript p. 20). This testimony included a statement by Mr. Eugene J. Morris, who asserted that either a bi-state compact or an appeal to the United States Supreme Court would resolve the matter, which " . . . is at the moment totally unresolved." (Transcript p. 25). The testimony also included a statement by United States Senator Kenneth B. Keating of New York, who submitted a memorandum from the Library of Congress on the issue (Transcript p. 64), as well as statements by Robert F.

Wagner, Mayor of New York City, and by New York Congressman, Leonard Farbstein. On September 5, 1963, the City of Jersey City responded to the hearing by enacting a zoning ordinance applicable to Ellis Island which would control any development on the island if it were sold to private interests.

The sovereignty and jurisdiction of the State of New York and the State of New Jersey over Ellis Island was ultimately the subject of a complaint entitled *Frank J. Guarini v. The State of New York and the State of New Jersey*, which was filed in the Superior Court of New Jersey, Chancery Division, Hudson County on November 9, 1984 and was then removed to the United States District Court for the District of New Jersey. The State of New Jersey filed an Answer to that Complaint on January 9, 1985, and admitted the Plaintiffs' factual allegations in the Third Count, paragraph 2 of the Complaint. Those allegations were:

2. The landfill and accretions to Ellis Island, consisting of approximately 24.5 acres, fall within the territorial jurisdiction and the sovereignty of the defendant State of New Jersey under the terms of the compact of 1834.

The Federal District Court remanded the *Guarini* action to the state court, which subsequently dismissed the case on the ground that only the United States Supreme Court has jurisdiction to decide the boundary issues between states. *Guarini v. State of New York*, 215 N.J. Super. 426, 521 A.2d 1362 (Chan. Div. 1986), *aff'd*, 215 N.J. Super. 293, 521 A.2d 1294 (App. Div. 1986), *certif. den.*, 107 N.J. 77, 526 A.2d 157 (1987) *cert. den.*, 484 U.S. 817, 108

S.Ct. 71, 98 L.Ed.2d 34 (1987). The State of New York was a party to the litigation.

On June 23, 1986, Thomas H. Kean, Governor of the State of New Jersey, and Mario M. Cuomo, Governor of the State of New York, signed a Memorandum of Understanding agreeing to divide the state and local taxes collected on Ellis Island and Liberty Island equally and to devote this revenue to relief for homeless persons of both states. The taxes involved include sales, income, and corporate taxes. Both Governors agreed to use their best efforts to have their legislatures approve the proposal, and the agreement was incorporated into law by the State of New Jersey in 1987, N.J.Stat.Ann. 32:32-1 *et seq.* However, the agreement has not yet been incorporated into law by the State of New York.

Most recently, in 1992, the State of New Jersey appeared as an *amicus curiae* in *Collins v. Promark Products, Inc.*, *supra*, to assert its jurisdictional and territorial rights over the filled portion of Ellis Island before the United States Court of Appeals for the Second Circuit. The State of New York also appeared as an *amicus curiae* in that litigation to support its jurisdictional and territorial claims over the same filled land.¹ The *Collins* Court held that the law of the State of New York regarding workers compensation would apply to the litigation involving an accident which occurred on the filled portion of Ellis Island.

¹ Neither state was a party to the *Collins* litigation, and neither state was involved in the litigation before the trial court. Neither state was allowed to enlarge the record before the appellate court.

F. New York's Imminent Plan for the Development of the Filled Portion of Ellis Island in the Face of This Dispute Warrants This Court's Intervention

The existence of a dispute between the State of New Jersey and the State of New York as to the proper jurisdiction over the filled portion of Ellis Island has a severe impact on the potential development of these lands, which have been unoccupied and essentially not maintained since 1954. This area is a prime site for commercial development, and uncertainty as to jurisdiction over this area inhibits its full development. For example, Center Development Corporation of New York proposed in 1992 to renovate the 120,000-square-foot baggage and dormitory building on Ellis Island into a 135-room hotel. Most recently, it proposed a student dormitory be constructed on the island. The company has also proposed to renovate 27 other buildings on Ellis Island into a conference center. This last proposal was selected in 1983 by the Interior Department as the best way to preserve the historic structures on the island at no cost to taxpayers.

The State of New Jersey has attempted to negotiate an overall resolution of this dispute with the State of New York. The 1986 Memorandum of Understanding and the approval of that agreement by the New Jersey Legislature are illustrative of those attempts. Officials of the State of New Jersey have requested that the Governor of the State of New York use his best offices to have the proposed partial resolution of this dispute submitted to the Legislature of the State of New York, and there approved. Such efforts have not been successful, and it appears highly

unlikely that any agreement as to this jurisdictional dispute can be reached.

The original jurisdiction of this Court is invoked because there is a pressing need for a prompt and final settlement of the controversy, and because the question in issue, the jurisdiction over the filled lands of Ellis Island, between the State of New Jersey and the State of New York, can be resolved by this Court alone. As an illustration of this pressing need to settle this matter, the State of New Jersey points to the recent actions of the New York City Landmarks Preservation Commission. On November 10, 1992, the Commission held hearings in the process of having the entire island declared a city landmark. In taking this action, the Commission is endeavoring to extend the decision of the Court of Appeals in *Collins v. Promark Products, Inc.*, *supra*, to all matters involving state jurisdiction over the entire island.

The need for the immediate resolution by the Court of the boundary dispute concerning Ellis Island is further exemplified by the current development proposals for the island. The National Park Service plans to act under the National Historic Preservation Act, 16 U.S.C. §470(f), and present for public comment in the near future plans by the Center Development Corporation of New York for the renovation of three existing buildings on the filled area of the island. The buildings will be designed to house graduate students and professors for certain colleges and universities within the City of New York in New York State. The renovations are to be financed by the proceeds of bonds issued by the Dormitory Authority of the State

of New York. The Center intends to use the money generated by the dormitories to build an international scholastic center at other renovated buildings on the island. The Authority is limited by statute to projects in New York State under the Dormitory Authority Act, N.Y. Public Authorities Law §1675 *et seq.* (McKinney 1981), and having a part in this development would be a violation of this law. The proposal constitutes an unwarranted extension of the decision in *Collins*, which in any event was erroneous, and is contrary to New Jersey sovereignty over the filled portion of the island.

New Jersey Attorney General Robert J. Del Tufo wrote to New York Attorney General Robert Abrams on January 8, 1993 reiterating New Jersey's jurisdictional and sovereignty claims over Ellis Island. The letter further indicated that the failure of the New York Legislature to adopt concurrent legislation as intended in the 1986 Memorandum of Understanding could result in the within action in this Court. Attorney General Abrams responded by letter dated February 8, 1993. He stated that New York Governor Mario M. Cuomo submitted bills essentially identical to New Jersey's implementing legislation to the New York Legislature on three separate occasions, in 1986, 1987 and 1988. "However, despite the Governor's active efforts, the Legislature declined to pass the bill in each of three successive years. Thus, Governor Cuomo has used his best efforts to secure enactment of the Liberty Trust Fund legislation." No proposals have been submitted to the Legislature by the Governor since 1988. At the same time, the staff of the State of New Jersey Historic Preservation Office has been advised that the National Park Service plans to present for public

comment a proposal by the Center Development Corporation for the renovation of three existing buildings on the filled portions of Ellis Island. Center Development anticipates that financing of these renovations will be undertaken with the proceeds of bonds issued by the Dormitory Authority of the State of New York. In addition, New York City is seeking to have the entire island declared a New York City landmark. These actions, coupled with the New York Legislature's inaction for nearly seven years, force New Jersey to conclude that the 1986 Memorandum of Understanding is a nullity, and of no force and effect and cannot now form the basis of a partial resolution of the matter in controversy.

SUMMARY OF ARGUMENT

This is a suit under this Court's original and exclusive jurisdiction seeking to resolve a serious and long-standing dispute between New York and New Jersey concerning the location of their common boundary on Ellis Island, in the Hudson River and Upper New York Bay. It seeks to enjoin New York from exercising its jurisdiction over a 24.5-acre portion of the island which was created by artificial filling after 1834. New Jersey asserts that pursuant to an 1834 Compact fixing the boundary between New Jersey and New York and to this Court's decisions regarding state boundary law, all portions of Ellis Island that were created by artificial filling after 1834 are within New Jersey's territory and are subject to its jurisdiction. New York claims that the whole of Ellis Island, including the artificially filled areas, is within its territory and subject to its jurisdiction.

This Court has original and exclusive jurisdiction over controversies between states under 28 U.S.C. §1251(a), and is thus the only Court available to resolve this dispute. *Mississippi v. Louisiana*, 506 U.S. ___, 113 S.Ct. 549, 121 L.Ed.2d 466 (1992). Moreover, there is a pressing need for this Court to finally resolve this long-standing controversy. New Jersey has been attempting for many decades to resolve the issues concerning Ellis Island without success. These attempts have involved state and federal officials, including United States Senators, United States Congressional Representatives, local officials, and the Governors of both states. These long-standing but futile efforts by the highest officials of both states demonstrate "the seriousness and dignity of the claim." *Id.*, 506 U.S. at ___, 113 S.Ct. at 552, 121 L.Ed.2d at 471.

In addition, in 1992 the Court of Appeals for the Second Circuit held, in a workers compensation and products liability matter, that the law of New York would be applied to resolve a claim for contribution for damages sustained on the filled portion of Ellis Island, rather than the law of New Jersey. *Collins v. Promark Products, Inc.*, *supra*. The *Collins* decision reflects an erroneous determination that the whole of Ellis Island is within the jurisdiction of New York. It is now being relied upon by New York to expand its governmental authority over the filled portion of Ellis Island. Only a resolution by this Court can halt this activity, which threatens New Jersey's sovereign right to review and regulate construction within its borders, to impose sales, corporate, and income taxes on any development within its jurisdiction, and to

otherwise appropriately and fully exercise its authority within its lawful boundaries.

New Jersey's jurisdiction over the lands in dispute is established by the precedents of this Court and by an 1834 Compact between New York and New Jersey. That Compact, 4 Stat. 708, fixed the boundary between the states by allocating a three-acre land area then known as Ellis Island to New York and by allocating the lands under the waters of the river and bay surrounding that island to New Jersey. Between 1890 and 1934, the United States filled the New Jersey waters surrounding Ellis Island, and thereby increased the island's size by approximately 24.5 acres.

This Court has repeatedly held that the artificial filling of waters along a state's river boundary does not operate to change the location of its boundary with the adjacent state. *Georgia v. South Carolina*, 497 U.S. 376, 110 S.Ct. 2903, 111 L.Ed.2d 309 (1990). This rule is "settled beyond the possibility of dispute." *Arkansas v. Tennessee*, 246 U.S. 158, 173, 38 S.Ct. 301, 304, 62 L.Ed. 638, 647 (1918), and clearly establishes New Jersey's jurisdiction over the 24.5-acre portion of Ellis Island created by artificial filling after 1834.

New Jersey's sovereignty claim is also fully consistent with the actions of the United States, which in 1904 purchased the lands it intended to fill from New Jersey. This purchase rightfully reflected that New Jersey owns the lands under its tidal waters. *Phillips Petroleum Co. v. State of Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988). Moreover, the sale of its land by New Jersey

did not and could not in any way convey away its sovereignty. *Central Railroad Co. v. Mayor, etc., of Jersey City*, 209 U.S. 473, 28 S.Ct. 592, 52 L.Ed. 896 (1908). Thus the conveyed lands remained within the territorial boundaries of New Jersey, as set by the Compact of 1834.

Despite New Jersey's jurisdiction over the artificially filled portion of Ellis Island, New York has alleged that New Jersey has accepted New York's assertion of sovereignty over all of Ellis Island and has thereby relinquished its jurisdiction. These assertions are unfounded because, from the time artificial filling commenced in 1890, the State of New Jersey and its citizens have continuously disputed the State of New York's claim of jurisdiction.

Although, "long acceptance of the status quo counts for a great deal in matters of territorial dispute between states," *Collins v. Promark Products, Inc., supra*, 956 F.2d at 388, no such acceptance occurred in this case. Rather, New Jersey officials repeatedly objected to New York's assertion of jurisdiction over the filled area of Ellis Island, and New York and New Jersey have in fact been engaged in an ongoing dispute concerning the boundary between them on the island. Cf. *New Jersey v. Delaware*, 291 U.S. 361, 376-377, 54 S.Ct. 407, 412, 78 L.Ed. 847, 855 (1934). In such circumstances, New York's defense against New Jersey's claim of sovereignty over the filled portion of Ellis Island must fail.

The *Collins* Court did not have before it either the record of New Jersey's ongoing objections to New York's improper exercise of sovereignty or the legislative history

of the Compact of 1834.² That history shows that after the Compact was enacted, a Boundary Commission in 1888-1890, composed of representatives from both states, drew the line between the states. That Boundary Commission recognized that a great amount of filling had taken place in the Hudson River and in New York Bay between 1834 and 1880, but interpreted the Compact of 1834 as fixing the boundary line with reference to the shoreline *as it originally existed in 1834*. The Commission therefore spent considerable time and effort to find a map from 1834, eventually locating a United States Coast and Geodetic Survey map prepared "a few years after the treaty of 1834." The Commission determined to use that map for the purpose of drawing the boundary line. After doing so, the Commission drew the common boundary between New York and New Jersey by reference to the shoreline of 1834. By filing this suit, New Jersey is simply asking this Court to enforce that boundary line between the original island and the filled land now comprising Ellis Island.

LEGAL ARGUMENT

I.

THE BOUNDARY DISPUTE BETWEEN NEW JERSEY AND NEW YORK PRESENTS A JUSTICIABLE CASE OR CONTROVERSY REQUIRING THE EXERCISE OF THE COURT'S ORIGINAL JURISDICTION.

The language of Article III, Section 2, Clause 2 of the Constitution of the United States gives original

² New Jersey did not participate before the trial court in *Collins*. Neither New York nor New Jersey was allowed to enlarge the record before the appellate court.

jurisdiction to this Court "In all cases . . . in which a State shall be a Party . . ." In order to determine if a particular dispute constitutes a justiciable "case" within the meaning of the Constitution, the Court has found that the complaining State must suffer an apparent wrong as a result of the second State's action which furnishes grounds for judicial redress or that it asserts a judicially enforceable right under accepted principles of common law or equity. *Massachusetts v. Missouri*, 308 U.S. 1, 15, 60 S.Ct. 39, 84 L.Ed. 3 (1939).

Plaintiff, the State of New Jersey, submits that a boundary dispute such as that involved in this case is, without doubt, a constitutionally justiciable "case" between states, requiring the exercise of the Court's original jurisdiction. Indeed, there has been no serious doubt on this score since the Court first addressed this question in *Rhode Island v. Massachusetts*, 37 U.S. 657, 9 L.Ed. 1233 (1838). The Court considered the derivation of the judicial power under the Constitution in conjunction with a discussion of those attributes of sovereignty retained and surrendered by the states under the Constitution. *Id.*, 37 U.S. at 720-731, 9 L.Ed. at 1258-1263. The Court noted that the power to resolve a boundary dispute in the manner normally available to sovereigns had been surrendered by the states and concluded that an original action before this Court was the only constitutional means available for legally resolving such a dispute between States. *Id.*, 37 U.S. at 726, 9 L.Ed. at 1261.

Most recently, in *Mississippi v. Louisiana*, 506 U.S. ___, 113 S.Ct. 549, 121 L.Ed.2d 466 (1992), this Court reaffirmed this principle. In that matter, in an action originally commenced by private plaintiffs against other

private defendants in a federal district court, the State of Louisiana filed a third-party complaint against Mississippi seeking to determine the boundary between the two states in the vicinity of the land disputed by the private parties. The Court held that 28 U.S.C. §1251(a) conferred upon this Court original and exclusive jurisdiction of all controversies between two states, and deprived the District Court of jurisdiction over the third-party complaint. The Court stated that its original jurisdiction would be exercised only "sparingly" because it "is of so delicate and grave a character." In determining whether a case is "appropriate" for its original jurisdiction, the Court wrote that it would examine two factors: first, "the nature of the interest of the complaining State . . . focusing on the seriousness and dignity of the claim," and, second, "the availability of an alternative forum in which the issue tendered can be resolved." *Id.*, 506 U.S. at ___, 113 S.Ct. 549, 552-553, 121 L.Ed.2d at 471-472.

Judged against these standards, the Court should permit the filing of the complaint in this matter. As to "the seriousness and dignity of the claim," the State of New Jersey points to the attempts that it has been making for decades to resolve the issues concerning Ellis Island. State and federal officials on both sides have been involved, including United States Senators, United States Congressional Representatives and local officials. The Governors of both states reached an agreement concerning application of the revenues derived from Ellis (and Liberty) islands in 1986, but the New York Legislature did not ratify the agreement. These efforts, over many years, demonstrate the seriousness of the interest of the complaining state. *Id.*

As to the availability of an alternative forum, the Court's decision in *Mississippi v. Louisiana*, *supra*, makes clear that there is no alternative forum. An attempt was made to litigate this dispute in the State courts of New Jersey, and that attempt was rebuffed, on precisely that ground. *Guarini v. State of New York*, *supra*. Neither is there a superceding issue which may be determined by a lower court. (See, e.g., *Arizona v. New Mexico*, 425 U.S. 794, 96 S.Ct. 1845, 48 L.Ed.2d 376 (1976).) This matter is a border dispute between states, the very type of action requiring the exercise of this Court's original jurisdiction. In the case at bar, the State of New Jersey, relying on the Compact of 1834, asserts that its boundary with the defendant, the State of New York, on Ellis Island is the original natural mean high water line as it existed in 1834. The defendant, the State of New York, claims jurisdictional sovereignty over the entire island, natural and filled, despite the Compact of 1834. There is clearly a controversy between the two states which calls for a resolution by this Court.

There is, moreover, a pressing need for the prompt and final settlement of this controversy. Resolution of the dispute is essential because, as stated previously, in 1992 the Court of Appeals for the Second Circuit issued its opinion in *Collins v. Promark Products, Inc.*, *supra*, holding in the context of a worker's compensation action that the law of New York would be applied to resolve a contribution claim for damages sustained on the filled portions of Ellis Island. Although the Court of Appeals for the Second Circuit does not have jurisdiction to resolve the dispute between New York and New Jersey concerning its common border, the decision of that court in *Collins v.*

Promark Products, Inc., supra, reflects a determination that the whole of Ellis Island, including the lands artificially filled after 1834, is within the territory of New York and subject to its governmental jurisdiction. This decision was patently erroneous and is being improperly relied upon by the State of New York to expand its governmental authority over the filled portions of the island. For example, on or about November 10, 1992, the Landmarks Preservation Committee of the City of New York held hearings on the question of whether the whole of Ellis Island should be declared a city landmark. In taking that action, the Commission is endeavoring to extend the *Collins* decision to all matters involving state jurisdiction over the entire island.

The need for immediate resolution by the Court of the boundary dispute concerning Ellis Island is further exemplified by the current development proposals for the island. New Jersey officials have been advised that the National Park Service plans to act under the National Historic Preservation Act, 16 U.S.C. §470(f), and present for public comment in the near future plans by the Center Development Corporation of New York for the renovation of three existing buildings on the filled area of the island. The buildings will be designed to house graduate students and professors for certain colleges and universities within the City of New York in New York State. Center Development anticipates that financing of these renovations will be undertaken with the proceeds of bonds issued by the Dormitory Authority of the State of New York. Center Development intends to use the money generated by the dormitories to build an international scholastic center at other renovated buildings on the

island. The Authority is limited by statute to projects in New York State under the Dormitory Authority Act, N.Y. Public Authorities Law §1675 *et seq.* (McKinney 1981), and having a part in this development would be a violation of this law. The proposal constitutes an unwarranted extension of the decision in *Collins*, which in any event was erroneous, and is contrary to New Jersey sovereignty over the filled portion of the island.

The Court has original and exclusive jurisdiction over state boundary disputes. This matter involves the New Jersey-New York boundary on Ellis Island, an issue that has concerned the highest officials of both states for many decades. The seriousness of the dispute is evident. No other forum exists to resolve the controversy. Moreover, pending development proposals make urgent the need for this Court to grant New Jersey's motion.

II.

THE MIDDLE LINE OF THE HUDSON RIVER AND NEW YORK BAY WAS AGREED TO BE THE BOUNDARY BETWEEN NEW JERSEY AND NEW YORK IN THE COMPACT OF 1834. EXCEPT AS OTHERWISE PROVIDED IN THE COMPACT, NEW JERSEY HAS SOVEREIGN AUTHORITY AND ITS LAWS APPLY TO ALL LANDS ON NEW JERSEY'S SIDE OF THE BOUNDARY. THIS INCLUDES FORMERLY TIDE FLOWED LAND ARTIFICIALLY FILLED TO ENLARGE ELLIS ISLAND LONG AFTER THE COMPACT WAS RATIFIED.

Ellis Island and the present and formerly flowed tidelands surrounding it lie on New Jersey's side of the boundary between New Jersey and New York as resolved

in the Compact of 1834. The original natural Ellis Island in 1834 was much smaller than the Ellis Island of today, comprising only a part of the northern end of the island as it exists now. A map showing the original island and the artificial filling which took place between 1890 and 1936 is reproduced in the Appendix to the Court's decision in *Collins v. Promark Products, Inc.*, *supra*, 956 F.2d at 390. It is undisputed that a major portion of Ellis Island became secure and fast upland not by the slow and imperceptible process of the addition of soil gradually to the island, a process known as accretion, but rather by the sudden and perceptible artificial filling of the adjacent tidal portions of the Bay, a process called avulsion, which occurred here between 1892 and 1934. *Collins v. Promark Products, Inc.*, *supra*, 956 F.2d at 385. That artificial fill did not deprive New Jersey of its sovereignty over areas which the Compact of 1834 determined were part of New Jersey.

A. The Compact of 1834 Set the Boundary Between New York and New Jersey Subject to Certain Exceptions.

In 1834 a bi-state agreement was reached between New York and New Jersey concerning their common boundary in the Hudson River and New York Bay. Commissioners were empowered and appointed by both states in 1833 to determine the boundary, and they reached an agreement in the same year, on September 16, 1833. Their agreement was ratified by New Jersey on February 26, 1834, L. 1834, p. 188, N.J.Stat.Ann. 52:28-1 *et seq.* (1986), by New York on February 5, 1834, Laws of New York of 1834, c. 8, p. 8, N.Y. State Law §7 (McKinney

1984), and by the United States on June 28, 1834, c. 126, 4 Stat. 708. The agreement is referred to generally as the Compact of 1834.

Upon the three ratifications the Compact became a binding agreement between the two states. *Poole v. Fleege's Lessee*, 36 U.S. 185, 9 L.Ed. 680 (1837). The boundary line set by the Compact was surveyed and described by metes and bounds, monumented and recorded by both States. See N.Y. State Law §7 (McKinney 1984). It remains in effect today, unchanged.

The principal accomplishment of the Compact was to locate the boundary line between New York and New Jersey as the middle line of the Hudson River and New York Bay:

Article I. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan bay to the main sea; except as hereinafter otherwise particularly mentioned. [4 Stat. 709].

This provision placed Ellis Island within New Jersey, since it is well to the west or on New Jersey's side of the middle line of the Bay. Article II, however, carved out an exception to Article I, stating that "The state of New York shall retain its *present* jurisdiction of and over Bedlow's and Ellis' islands . . ." (emphasis supplied). 4 Stat. 709. Furthermore, Article III states that New York shall have

exclusive jurisdiction of and over all of the waters of the Hudson River and New York Bay, with the following exception:

The State of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey. [Article III(1); 4 Stat. 710.]

As explained herein, under the settled judicial construction accorded the Compact and the settled law of riparian rights, New Jersey has sovereignty over and its laws apply to the tidelands west of the boundary, sovereignty which is retained notwithstanding the artificial filling of the underwater lands.

B. The Settled Judicial Construction of the Compact Applies New Jersey's Laws West of the Boundary Line.

The first three provisions of the Compact quoted previously were construed in a number of early cases. In *People of the State of New York v. Central Railroad Co.*, 42 N.Y. 283 (1870), *app. dismissed*, 79 U.S. 455 (1872), the New York Court of Appeals rebuffed an attempt by the Attorney General of New York to cause the removal of railroad piers extending from the New Jersey shore one mile into the harbor. The Court held that the State of New York had in Article I "clear[ly] and explicit[ly]" released its right and claims to New Jersey to the lands under water west of the middle line of the Hudson River. *Id.* at 292. The middle line of the Hudson River became, upon ratification of the Compact, the boundary for the sovereignty

and jurisdiction of each state. *Id.* at 293. The New York Court limited the jurisdiction of New York as stated in Article III to the *waters* of the River (emphasis in original, *Id.* at 297), and indicated that New York's jurisdiction was limited to those police powers necessary to regulate commerce and navigation, and health:

By this exception, it was designed that vessels afloat upon said bay and river should not escape or evade the quarantine laws, and the laws relating to passengers of New York, by coming to anchor on or near the New Jersey shore, or by becoming attached to the wharves or docks on said shore or adjacent thereto, but in all other particulars they were left subject to the laws of New Jersey. [*Id.* at 300]

The same result was reached in *State v. Babcock*, 30 N.J.L. 29 (Sup. Ct. 1862). The New Jersey Court there held that New York had jurisdiction to seek the removal of obstructions to navigation in the Hudson River and for criminal violations in that regard below the low water line on the New Jersey side. *Id.* at 31-32. Justice Lucius Q.C. Elmer, who wrote for the Court, was one of the New Jersey Commissioners who negotiated the terms of the Compact of 1834. He stated that the intent of the Commissioners was to grant New York police and quarantine powers over the entire river, while New Jersey was accorded sovereignty and exclusive jurisdiction to the middle of the river. *Id.* at 33-34.

A Second Circuit Judge sitting in the Southern District of New York was early called upon to consider the same issues in *Atlantic Dredging Co. v. Bergen Neck Ry. Co.*, 44 F. 208 (S.D.N.Y. 1890). A railroad sought to trestle a

navigation channel off the mainland of Bayonne, New Jersey. The district court held that the lands under the waters there were those of New Jersey, and that it did not have jurisdiction, citing *People of the State of New York v. Central Railroad Co.*, 42 N.Y. 283 (1870), *app. dismiss.*, 79 U.S. 455 (1872).

Finally, this Court considered the Compact in *Central Railroad Co. v. Mayor, etc., of Jersey City*, 209 U.S. 473, 28 S.Ct. 592, 52 L.Ed. 896 (1908) (Holmes, J.). The Court noted that the courts of both New York and New Jersey had agreed in interpreting the Compact. The Court held that New Jersey had the right to tax the land under water from the low water line to the middle line of the river under the Compact, *Id.* 209 U.S. at 478-479, 28 S.Ct. at 593, 52 L.Ed. at 899, adopting the view that the middle line of the Hudson River is the boundary of sovereignty and general jurisdiction, despite any apparent inconsistent language in Article III.

As previously stated, Article III provides that "New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river . . . and of and over the lands covered by the said waters . . . " to the low water line off New Jersey. Article III, N.J.Stat.Ann. 52:28-4 (1986). Speaking for the Court, Mr. Justice Holmes considered this provision and pointed out that the dominant purpose of the Compact was the establishment of the boundary line as the middle of the river and bay. *Id.*, 209 U.S. at 479, 28 S.Ct. at 593, 52 L.Ed. at 898. This was accomplished in Article I, *supra*. The Court refused to read Article III as granting to New York sovereignty over

the New Jersey side of the river and bay. Such an interpretation would strip Article I of its meaning, and was plainly wrong. *Central Railroad Co.*, *supra*, 209 U.S. at 479, 28 S.Ct. at 593, 52 L.Ed. at 899. Further, the Court refused to limit New Jersey's authority to merely one of ownership to the lands under the waters west of the middle of the Bay, despite the Compact's use of the phrase "exclusive right of property" to refer to New Jersey's claim to the west of the Bay. Article III(1). To do so would make New Jersey a mere landlord to the west of the middle of the Bay. Mr. Justice Holmes pointed out that this would be "inconsistent with titles already accrued" and that it "would lose significance the moment New Jersey sold the land." *Central Railroad*, *supra*, 209 U.S. at 478-479, 28 S.Ct. at 593, 52 L.Ed. at 898. To read the Compact otherwise would call into question why New Jersey would ratify such an agreement at all: it would be essentially a one-sided agreement in favor of the State of New York.

In more recent times, the Courts of both New York and New Jersey have decided that torts committed west of the middle line of the Hudson River give rise to the application of New Jersey law. In *Kowalskie v. Merchants & Miners Transportation Co.*, 76 N.Y.S. 2d 699 (Sup. Ct. 1947), the court applied New Jersey's shorter statute of limitations to injuries occurring to seamen in the waters of the river west of the middle line. Similarly, in *In re Gutkowski's Estate*, 135 N.J.Eq. 93, 33 A.2d 361 (Prerog. Ct. 1943), the court applied New Jersey's distribution statute because that was the situs of the injury. The minor's death occurred in a ferry boat collision on the New Jersey side of the Hudson River. And finally, in *Clarke v. Ackerman*, 243 A.D. 446, 278 N.Y.S. 75 (1935), New York's

Appellate Division applied New Jersey law to an accident which occurred 800 feet west of the center of the George Washington Bridge, which crosses the Hudson River between New Jersey and New York.

As a result of the Compact and its consistent interpretation by the courts of New York, New Jersey, the lower federal courts, and this Court, the lands under water to the west of the midline of the Hudson River and Upper New York Bay are lands within the territory of New Jersey, and are subject to its sovereign jurisdiction in all matters. The only exception is that New York accepted the responsibility of police and quarantine powers over the whole Harbor. The lands under water around Ellis Island in 1834 were lands of the State of New Jersey, and remained under the sovereignty of New Jersey even after fee title was sold in 1904.

C. Artificial Filling of a Portion of Tidal New Jersey Land to Expand Ellis Island Long After the Ratification of the Compact Did Not Deprive New Jersey of Its Sovereignty Over These Lands.

By reason of the Compact, the tidal lands around Ellis Island at that time (1834) were confirmed as being within the jurisdiction, sovereignty, and ownership of the State of New Jersey. Article III(1), N.J.Stat.Ann. 52:28-4 (1986). It is those lands that were filled in the years following the Compact to make Ellis Island the size it is today.

However, such artificial avulsive action does not operate to change the boundaries of New Jersey and New York set by the 1834 Compact. The land involved is still

that of New Jersey. This is because avulsive change of water boundaries between two states does not change their boundaries.

The decisions standing for this proposition are legion. In the United States Supreme Court, they stretch from *New Orleans v. United States*, 35 U.S. 662, 717, 9 L.Ed. 573, 594 (1836), to *Georgia v. South Carolina*, 497 U.S. 376, 110 S.Ct. 2903, 111 L.Ed.2d 309 (1990). In *Georgia v. South Carolina*, this Court reviewed the effects of the work of an Army Corps of Engineers' navigation project on the boundary between Georgia and South Carolina. It held that the changes in the flow of water which made new upland caused by hydraulic fill done by the Corps did not change the states' boundary. The Court reaffirmed those principles of law as follows:

General rules concerning the formation of riparian land are well developed and are simply expressed and well accepted. When the bed is changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream. But if the stream leaves its old bed and forms a new one by the process known as avulsion, the result works no change of boundary. *Arkansas v. Tennessee*, 246 U.S. 158, 173, 38 S.Ct. 301, 304, 62 L.Ed. 638 (1918). [*Georgia v. South Carolina*, *supra*, 497 U.S. at 403, 110 S.Ct. at 2919, 111 L.Ed.2d at 335 (1990).]

Arkansas v. Tennessee, *supra*, cited by the Court in *Georgia v. South Carolina*, *supra*, involved a natural sudden and violent new channelization of the Mississippi River between the two states, *i.e.*, an avulsive change in the watercourse. The Court stated the rule as settled that

avulsion by natural or artificial means works no change in state boundaries:

It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. *New Orleans v. United States*, 35 U.S. 662, 717, 9 L.Ed. 573 (1836); *Jefferis v. East Omaha Land Company*, 134 U.S. 178, 189, 10 S.Ct. 518, 33 L.Ed. 872 (1890); *Nebraska v. Iowa*, 143 U.S. 359, 361, 367, 370, 12 S.Ct. 396, 36 L.Ed. 186 (1892); *Missouri v. Nebraska*, 196 U.S. 23, 34-36, 25 S.Ct. 155, 49 L.Ed. 372 (1904). [*Arkansas v. Tennessee*, *supra*, 246 U.S. at 173, 38 S.Ct. at 304, 62 L.Ed. at 647 (1918).]

The land involved in this matter was unquestionably filled by the United States Government between 1890 and 1934. The original island, the Ellis Island of the Compact of 1834, was called Island No. 1, and is the approximate location of the Great Hall.

The sequence of filling that occurred thereafter is shown in the map attached as an Appendix to *Collins v. Promark Products, Inc.*, 956 F.2d at 390. The filled lands

were known as Island No. 2 and Island No. 3 until the dock basin between the two islands was itself filled. These were artificial changes *at* the water boundary between New York and New Jersey. Under the settled law of this Court, this filling worked no change *in* the boundary between the two states: the filled land, once under water and subject to the sovereign jurisdiction of New Jersey, was still land of the State of New Jersey, even after it became filled upland.

D. The State of New Jersey Has Not Lost Sovereignty And Jurisdiction Over the Filled Portions of Ellis Island Under the Theory of the Long Acceptance of the *Status Quo* By New Jersey.

In *Collins v. Promark Products, Inc.*, *supra*, the Second Circuit Court of Appeals considered a worker's compensation action arising from an injury which occurred on the artificially filled portion of Ellis Island. The Court held that New York law applied to the filled lands, and stated *in dicta* that,

[L]ong acceptance of the status quo counts for a great deal in matters of territorial disputes between states. *See, e.g., Georgia v. South Carolina*, 497 U.S. 376, 110 S.Ct. 2903, 2914, 111 L.Ed.2d 309 (1990); *Arkansas v. Tennessee*, 310 U.S. 563, 569-71, 60 S.Ct. 1026, 1030-31, 84 L.Ed. 1362 (1940); *Michigan v. Wisconsin*, 270 U.S. 295, 306-08, 46 S.Ct. 290, 293-94, 70 L.Ed. 595 (1926); *Indiana v. Kentucky*, 136 U.S. 479, 511-12, 10 S.Ct. 1051, 1054-55, 34 L.Ed. 329 (1890). [*Collins, supra*, 956 F.2d at 388.]

The *Collins* court did not have before it the record of New Jersey's objections over the years to New York's assertion of jurisdiction over the filled portions of Ellis Island. While New York claims sovereignty over the island for over one hundred and fifty years, *Collins, supra*, 956 F.2d at 387, it must be remembered that the land at issue in this matter was all under the waters of New York Bay until after the 1890's, and until then the land under water was unquestionably New Jersey's land. The filling occurred between 1890 and 1934, so that Ellis Island increased from approximately 3 acres to approximately 27.5 acres only after 1890, and indeed did not reach its current size until nearly 1934. *Collins, supra*, 956 F.2d at 385.

Even in the 1890's, *i.e.*, from the very start of the filling, New Jersey asserted its claim of sovereignty and jurisdiction over the lands filled and to be filled. As a result, the United States Government recognized New Jersey's title to the lands to be filled around Ellis Island and the surrounding waters in 1904. In that year, the Government purchased New Jersey's proprietary interest in this land for fair market value and received from the State of New Jersey a State tidelands deed for Ellis Island pursuant to N.J.Stat.Ann. 12:3-1 *et seq.* (1979).³ The

³ A tidelands grant conveys property rights. It does not affect sovereignty or cede jurisdiction from one political jurisdiction to another. Thus, while New Jersey no longer owns, in a proprietary sense, the land it sold to the Government, New Jersey continues to exercise sovereignty over that part of the state unaffected by the grant of ownership, in the same manner that it does over the many other parcels of New Jersey tidelands, and other lands, that it has conveyed. *Central Railroad Co.*

Attorney General of the United States wrote to the Board of Riparian Commissioners of the State of New Jersey as follows on July 15, 1904:

Heretofore, it would seem, the General Government has proceeded upon the theory that the ownership of the lands under water around Ellis Island was in the State of New York. In 1800 New York ceded its jurisdiction over Ellis Island to the United States; in 1808 it condemned the island and sold it to the United States; and in 1880 it granted to the United States its title and jurisdiction to and over the lands under water around Ellis Island within certain limits.

While there is no question as to the ownership and jurisdiction of New York of and over Ellis Island proper and its power to convey the same to the United States, it would seem from the boundary agreement between New York and New Jersey of September 16, 1833 that the ownership of the lands under water west of the Hudson River and the Bay of New York is in the State of New Jersey. [The letter is quoted in Pike, Henry H., *Ellis Island - Its Legal Status* at 60-61. (General Services Admin., Office of General Counsel Opinion 143, February 11, 1963).

The State of New Jersey and its citizens have publicly asserted the sovereignty claim of the State of New Jersey to the filled portion of Ellis Island many times over the years after 1904, as indicated in the proposed Complaint (paragraph 13) and in the Statement of Facts.

v. Mayor, etc., of Jersey City, supra, 209 U.S. at 478-479, 28 S.Ct. at 593, 52 L.Ed. at 898.

The cases cited by the *Collins* Court do not apply to territorial disputes between states in which the state apparently out of possession repeatedly objected to the *status quo*. In *Georgia v. South Carolina, supra*, this Court unanimously applied the doctrine of prescription and acquiescence against Georgia concerning the (former) Barnwell Islands. The Court agreed with South Carolina that Georgia had asserted *no* act of dominion or control over the islands for over 163 years, and held that "inaction alone may constitute acquiescence when it continues for a sufficiently long period." *Id.*, 497 U.S. at 393, 110 S.Ct. at 2914, 111 L.Ed.2d at 328.

In *Arkansas v. Tennessee, supra*, the Court found that Tennessee had exercised dominion and jurisdiction over the disputed lands for nearly 113 years without *any* objection from Arkansas, and awarded the former island to Tennessee, on the basis of Arkansas' long acquiescence. In *Michigan v. Wisconsin, supra*, three separate areas were at issue, all involving river boundaries. For over 50 years in one area, for over 60 years in another, and for over 75 years in the third, the Court held that Wisconsin had continuously asserted title and had exercised complete and exclusive dominion over the disputed lands. In the absence of any objection by Michigan during these times, the Court awarded the lands to Wisconsin. Finally, *Indiana v. Kentucky, supra*, the last case cited by the *Collins* Court, concerned jurisdiction and sovereignty over Green River Island in the Ohio River. The Court ruled on the basis of the "long silence and acquiescence" of nearly 100 years, and found in favor of Kentucky. *Id.*, 136 U.S. at 512, 10 S.Ct. at 1054, 34 L.Ed. at 333.

In each of the cited cases in which the Court considered the impact of inaction on the assertion of a state boundary, the period of time involved was substantially longer than any that could be alleged here. From the time the land was filled to its final extent, *i.e.*, in 1934, hardly a decade went by without public protest of New York's claims to the entire island. Therefore these cases are not applicable to New Jersey's present claim of sovereignty over the filled lands of Ellis Island.

In those instances in which, as in this case, the boundary is in controversy over the years, this Court has not found acquiescence even in the face of total prescription by the claiming state. In *New Jersey v. Delaware*, 291 U.S. 361, 54 S.Ct. 407, 78 L.Ed. 847 (1934), the Court stated that, "the truth is that almost from the beginning of statehood, Delaware and New Jersey have engaged in a dispute as to the boundary between them," and held that, "acquiescence is not compatible with a century of conflict." *Id.*, 291 U.S. at 376-377, 54 S.Ct. at 412, 78 L.Ed. at 855.

This Court has been reluctant to apply the doctrines of prescription and acquiescence to determine state boundaries except in the clearest of circumstances. In *Illinois v. Kentucky*, 500 U.S. ___, 111 S.Ct. 1877, 114 L.Ed.2d 420 (1991), the Court stated that the state claiming the defense of prescription and acquiescence must first show by a preponderance of the evidence long and continuous possession of, and assertion of sovereignty over, the disputed area, and then, second, would have the burden of proving the other State's long acquiescence in those acts of possession and jurisdiction. *Id.*, 500 U.S. at ___, 111 S.Ct. at 1881, 114 L.Ed.2d at 428. In that case,

Kentucky did not prevail on either defense. There was no prescription because Kentucky did not uniformly tax structures in the disputed area, and because the State Attorney General and the Kentucky Legislature had previously taken positions not claiming the land. There was no acquiescence because Illinois court decisions had taken a contrary position to that espoused by Kentucky. Similarly in *Arkansas v. Tennessee*, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638 (1918), this Court held that then recent Court decisions of both states and Tennessee legislation establishing boundary commissions with authorization to file suit fell "far short of that long acquiescence in the practical location of a common boundary, and possession in accordance therewith, which in some of the cases has been treated as an aid to setting the question at rest." *Id.*, 246 U.S. at 172, 38 S.Ct. at 304, 62 L.Ed. at 647.

The decisions in these cases may readily be applied to assist the Court in determining whether New York has exercised such long-standing prescription over the filled portion of Ellis Island, and New Jersey has acquiesced in those acts of possession and jurisdiction, so as to negate New Jersey's claim to those lands. First, New York may not count its occupation of these filled lands from its domination over Ellis Island since colonial times. The lands involved were not "made land" until no earlier than 1890 and some were not artificially filled to the point of being upland until almost 1934. The map detailing the progress of the artificial filling is reproduced in the Appendix to the Court's decision in *Collins v. Promark Products, Inc.*, *supra*, 956 F.2d at 390. Secondly, the State of New Jersey asserted its jurisdiction and sovereignty over these tidal lands filled and to be filled sufficiently

decisively in 1904 that the United States Government recognized its rights and purchased a tidelands deed from New Jersey. The prescription and acquiescence claimed by New York should not start running against New Jersey until the land was all filled, *i.e.*, just before 1934, but certainly not before 1904. Before that, there was no upland for New York to occupy.

Third, from then on, the sovereignty and jurisdiction of New Jersey over the filled lands of Ellis Island has been disputed. The City of Jersey City carried the island on its tax rolls as exempt property during the entire period. In 1934, a New Jersey Congresswoman asserted New Jersey's claim to part of Ellis Island, and the Public Works Administration work there was divided between New York's and New Jersey's unemployed. In 1955 state officials brought the matter up with federal officials again. It was discussed between New York and New Jersey Congressmen in debate on the floor of the House of Representatives, again in 1955. In 1960, the State asserted the claim directly with New York officials. In that year, the Council on State Governments attempted to mediate the issue. In 1962, the issue was raised in hearings before the United States Senate. In 1963, the City of Jersey City enacted a zoning ordinance to apply to the property if it came into private hands. In 1985, the State asserted the claim indirectly in litigation involving New York. In 1986, the Governors of both states, recognizing the claims of both States, signed a Memorandum of Understanding concerning the disposition of tax revenues from the island. The New Jersey Legislature ratified this agreement in 1987. N.J.Stat.Ann. 32:32-1 *et seq.* In 1992, both States appeared as *amicus* on the issue before

the Second Circuit Court of Appeals. All of these contacts and events were covered by the *New York Times* and other newspapers.

Thus, the matter of the correct and true state boundary on Ellis Island has been in conflict from almost the time the first submerged river bottom land was made upland. The cases in which this defense has been allowed have involved far more substantial periods of time, such as the 163 years in *Georgia v. South Carolina, supra*, the 113 years in *Arkansas v. Tennessee, supra*, and the 50 to 75 years in *Michigan v. Wisconsin, supra*. During all those times, the other state made *no* objection. Here, at best, the period is far shorter, and the State of New Jersey made, over the years, numerous objections to New York's claims. None of this record was before the Court in *Collins v. Promark Products, Inc., supra*. And because of this record, the State of New Jersey's claims should be evaluated on their merits and not dismissed on the defense of prescription and acquiescence.

E. The Legislative History Concerning the Compact of 1834 Supports the Conclusion That the Tidal Lands Filled Around the Original Ellis Island Were Intended To Remain Under the Sovereignty of the State of New Jersey.

The Court in *Collins v. Promark Products, Inc., supra*, 956 F.2d at 386-387 commented on whether the drafters of the Compact of 1834 intended filling to affect jurisdiction and sovereignty of the filled lands. The lands under water around the original Ellis Island in 1890 were clearly

New Jersey's under Article I of the Compact as interpreted by the early cases considering the Compact, including those before this Court. *State v. Babcock, supra*; *People v. Central Railroad, supra*; *Central Railroad v. Jersey City, supra*. Under the law developed by this Court, filling of tidal lands does not affect jurisdiction and sovereignty.

The *Collins* Court did not have before it any legislative history of the Compact of 1834, but nevertheless reasoned:

The language of the Compact concerns power over the *entity* known as Ellis Island and in no way implicates the size of the entity. It was the stated intention of the Commissioners that whatever matters were subject to the jurisdiction of New York at the time the Compact was entered into would continue thereafter to be subject to the jurisdiction of New York. Surely, the Commissioners must have contemplated that the territory of the Island might over the years decrease or increase as the result of natural or artificial forces. This is evidenced by the fact that language of size forms no part of the structure of the Compact as it specifically relates to Ellis Island. [*Collins v. Promark Products, Inc., supra*, 956 F.2d at 386-387. Emphasis in original]

The Compact of 1834 was followed by a Boundary Commission in 1888-1890, which was charged with actually drawing the line described by the Compact. Between 1830 and 1890 there was extensive development in the United States in general and in New York Harbor in particular, development which was accompanied by large scale filling of the shoreline, *i.e.*, the Hudson River and New York Bay. The Compact of 1834 set the midline of the

Hudson River and New York Bay as the boundary in Article I, but filling of the shoreline from 1834 to 1890 had changed the apparent midline of the Hudson River in 1890. The commissioners in 1890 interpreted the Compact to fix the midline *as it originally existed in 1834*, notwithstanding any subsequent filling. They therefore drew the boundary line between New Jersey and New York in the Hudson River and New York Bay by reference to the original, natural shoreline in 1834, not the filled-in shoreline of 1890. For this purpose, the Commissioners used a United States Coast and Geodetic Survey map dated "a few years after the treaty of 1834." *Report and Proceedings of the New Jersey Boundary Commission*, January 18, 1890 p.4-5. The boundary maps accompanying this report show both lines just for this purpose, *i.e.*, the shoreline of 1834 and the shoreline of 1890.

No reference is made in the Report to the filling around Ellis Island because it had not yet occurred. However, the interpretation of the Compact given in 1890 by the Commissioners of both New Jersey and New York indicates that, contrary to the view expressed by the *Collins* Court, the Commissioners of New Jersey and New York determined the boundary between the states by reference to the natural shorelines, and both states in 1890 felt that artificial filling could not and should not change sovereignty and jurisdiction. This is consistent with this Court's view of the effect of artificial filling on territorial boundaries. In the face of this history involving the agreement of both states in 1890, the fact that "language of size forms no part of the structure of the Compact as it specifically relates to Ellis Island," *Collins v. Promark Products, Inc.*, *supra*, 956 F.2d at 386-387, is not

persuasive. Both New Jersey and New York found filling relevant and important in 1890, and so drew their common boundary by reference to the shoreline of 1834. That is all that New Jersey asks here from this Court.

F. The New York Legislature Has Failed to Approve the Memorandum of Understanding in Nearly Seven Years and New York Has Recently Acted in Derogation of the Memorandum. Accordingly, the 1986 Memorandum of Understanding is a Nullity and of No Force and Effect.

The Memorandum of Understanding signed by New Jersey Governor Thomas H. Kean and New York Governor Mario M. Cuomo on June 23, 1986 represented, an attempt by the Governors to avoid disputes over sovereignty to Ellis Island, as well as Liberty Island, the site of the Statue of Liberty. The agreement only addressed the issue of revenues derived from these two islands. The Memorandum proposed to allocate certain revenues collected by both states on Ellis Island and Liberty Island equally for the relief of the homeless of both states. No resolution was proposed in the Memorandum for the related issues of zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and welfare laws, civil and criminal law, or for any other issue related to the jurisdiction of any state. It was a tentative, partial solution promptly embraced by the State of New Jersey.

In the Memorandum, Governors Kean and Cuomo agreed to use their best efforts to secure the enactment of legislation in their respective states to implement the

agreement. Within nine months of the Governors' agreement, New Jersey enacted legislation, N.J.Stat.Ann. 32:32-1 *et seq.* providing for the establishment of the Statue of Liberty Trust Fund. New Jersey law provided that it would become effective upon the enactment by New York of concurrent legislation. N.J. Laws of 1987, c. 57, §12.

New York never acted. New Jersey has been informed by New York Attorney General Robert Abrams that bills essentially identical to New Jersey's law were submitted to the New York Legislature three times: in 1986, 1987 and 1988. "These proposals were submitted as Governor's Program Bills, which represents legislation of the highest priority to the Governor. However, according to Attorney General Abrams' letter to New Jersey Attorney General Del Tufo, dated February 8, 1993, "despite the Governor's active efforts, the Legislature declined to pass the bill in each of three successive years." Since 1988, Governor Cuomo has not submitted the proposal to his Legislature. No action by the Legislature was recommended by him in 1989, 1990, 1991, 1992 or to date in 1993.

It is readily apparent that the State of New York no longer has any interest in taking steps to implement the 1986 Memorandum of Understanding. Instead, New York has taken steps to assert its full jurisdiction and authority over all of the filled portions of Ellis Island in an erroneous reliance upon the Court's decision in *Collins v. Promark Products, Inc.*, *supra*. The New York City Landmarks Preservation Commission held hearings recently concerning whether all of Ellis Island should be declared a New York City landmark. At the same time, the staff of

the State of New Jersey Historic Preservation Office has been advised that the National Park Service plans to present for public comment a proposal by the Center Development Corporation for the renovation of three existing buildings on the filled portions of Ellis Island. Center Development anticipates that financing of these renovations will be undertaken with the proceeds of bonds issued by the Dormitory Authority of the State of New York.

Although no time was stated in the Memorandum of Understanding for its implementation by both states, even if an offer does not limit the time for its acceptance, it must be accepted within a reasonable time. This rule of law is "well settled." *Minneapolis and St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, 119 U.S. 149, 151, 7 S.Ct. 168, 170, 30 L.Ed. 376, 377 (1886); Restatement (Second) of Contracts 2d §41(1) (1981). The reasonableness of the delay will be judged by the circumstances. *Minneapolis and St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, *supra*, Restatement (Second) of Contracts §41(2) (1981). The circumstances make clear that New York has failed to proceed in a reasonable time period. New Jersey's Legislature acted to implement the Memorandum of Understanding within nine months of the Governors' agreement. New York has failed to enact corresponding legislation; New York's Governor submitted the proposal to his legislature for three years thereafter: 1986, 1987 and 1988. The New York Governor thereafter abandoned any further efforts to implement the Memorandum in 1989, 1990, 1991, and 1992, or to date in 1993. These actions manifest a refusal by inaction to accept New Jersey's offer to resolve certain aspects of this controversy. These

actions can also be interpreted as manifesting New York's outright intention to reject New Jersey's offer.

New Jersey considers that the seven years that have passed is an unreasonable time to wait for New York's acceptance of resolution of the revenue issues. Accordingly, New Jersey no longer considers itself bound by the Memorandum. Unaccepted offers to enter into a contract bind neither party. *Blossom v. Milwaukee & Chicago Railroad Co.*, 70 U.S. 196, 205, 18 L.Ed. 43, 46 (1866). *Tilley v. City of Chicago*, 103 U.S. 155, 26 L.Ed. 374 (1881). The State of New Jersey will not recognize any late acceptance by New York of the Memorandum now as binding on it. The State of New Jersey considers that its offer has been rejected by New York by the lapse of time and by New York's actions in derogation of the compromise. An acceptance now by New York would not be binding on New Jersey. *Moffett, Hodgkins & Clarke Company v. City of Rochester*, 178 U.S. 373, 20 S.Ct. 957, 44 L.Ed. 1108 (1900); Restatement (Second) of Contracts 2d §42 (1981). The Memorandum of Understanding is a nullity as a direct consequence of the failure of New York to approve the compromise and of its recent actions to further extend its jurisdiction over the entire island. The partial proposed compromise is a dead letter, and void.

CONCLUSION

This Court has original and exclusive jurisdiction of this boundary dispute between the State of New Jersey and the State of New York. The dispute should be resolved by finding the boundary between the states to

be the original natural mean high water line on Ellis Island as it existed at the time of the Compact of 1834, so that the State of New York shall have exclusive sovereign authority over the original natural island, approximately three acres in size, and the State of New Jersey shall have exclusive sovereign authority over the approximate 24.5 acres of land artificially filled between 1890 and 1934.

Respectfully submitted,

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Attorney General of New Jersey

April 23, 1993

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APPENDIX

The Compact of 1834, 4 Stat. 708

CHAP. CXXVI. – An Act giving the consent of Congress to an agreement or compact entered into between the state of New York and the state of New Jersey, respecting the territorial limits and jurisdiction of said states.

WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:

Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance of an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18th, 1833, of the one part; and Theodore Frelinghuysen, James Parker, and Lucius Q. C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

ARTICLE SECOND. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel Creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said

state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, PROVIDED, That the navigation be not obstructed or hindered.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over the waters of the sound from the westernmost end of Schooter's Island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge Creek, and of and over all the waters of Raritan bay lying westward of a line drawn from the lighthouse at Prince's bay to the mouth of Mat-tavan Creek; subject to the following rights of property and of jurisdiction of the state of New York, that is to say:

1. The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New Jersey, which now exist or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and the middle of the said waters: PROVIDED, That the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH. Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offence committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid; or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof; may be served upon any of the said waters within the exclusive jurisdiction of the state of New York, unless such person or property shall be on board a vessel aground upon, or fastened to, the shore of

the state of New York, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this

sixteenth day of September, in the year of our Lord one thousand eight hundred and thirty-three and of the independence of the United States the fifty-eighth.

B. F. Butler,
 Peter Augustus Jay,
 Henry Seymour,
 Theo. Frelinghuysen,
 James Parker,
 Lucius Q. C. Elmer.

And whereas the said agreement has been confirmed by the legislatures of the said states of New York and New Jersey, respectively, - therefore,

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, PROVIDED, That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

APPROVED, June 28, 1834.

MEMORANDUM OF UNDERSTANDING
IN REGARD TO ESTABLISHING A BI-STATE
PUBLIC CORPORATION TO BE KNOWN AS THE
STATUE OF LIBERTY TRUST FUND

ARTICLE I

Liberty and Ellis Islands are national treasures symbolizing our nation as a land of hope for people yearning for freedom, justice, equality of opportunity and a better life.

The Statue of Liberty was the first sight of thousands of immigrants to the United States. The view of the Statue standing in the harbor symbolized the start of a new life with greater opportunities and challenges in this country. Ellis Island was the soil on which these immigrants first stepped in their new world.

There is now pending a lawsuit that seeks to determine the respective sovereignty and jurisdiction of the States of New Jersey and New York over Liberty and Ellis Islands. In view of the special subject matter involved, it is fitting that such conflicts be avoided by dedicating the economic benefits of sovereignty and jurisdiction over the Islands to a regional purpose related to the symbolic meaning of the Statue of Liberty and Ellis Island. However, since these Islands have long been under effective federal title, they can truly be said to belong to all of the people of the United States.

Today, the homeless population of the States of New York and New Jersey is a reminder that there are still many in this region for whom hopes of a better life remain unfulfilled. It is appropriate, in this centennial year of the Statue of Liberty, that Ellis and Liberty

Islands, the nation's monuments to the vast numbers of people who came from other countries seeking a better life, be rededicated to the assistance of our homeless population.

Homelessness is a regional problem that demands regional solutions. Because of the ease of access to interstate transportation and the very nature of their transient existence, the homeless now travel back and forth across state borders quickly and easily. It is therefore appropriate that the States of New Jersey and New York work cooperatively to develop and promote programs to assist homeless men, women and children in both states in obtaining decent and affordable shelter.

ARTICLE II

The Governors of the States of New York and New Jersey hereby agree to use their best efforts to secure enactment of identical legislation in their respective states which shall establish a bi-state public corporation to be known as the "Statue of Liberty Trust Fund" (hereinafter "the Fund").

The Fund shall be managed by an eleven member board of directors, five to be appointed by the Governor of the State of New York and five to be appointed by the Governor of the State of New Jersey, and one director, who shall be designated the chairperson of the board, to be appointed by the Governors jointly. All board members shall serve without compensation, but shall be entitled to reimbursement of their actual and necessary expenses incurred in the performance of their duties. The term of office of each member shall be five years and each

member shall hold office until his successor shall have been appointed.

No action of the board of directors of the Fund shall be binding unless taken at a meeting at which at least three of the members from each state are present and vote in favor thereof. The board of directors of the Fund shall annually submit a plan for the expenditure of the resources of the Fund which shall only become effective upon the approval of both Governors.

ARTICLE III

The purpose of the Fund shall be to provide aid to homeless persons within the States of New Jersey and New York. The Fund shall accomplish this objective primarily by entering into contracts with or making grants to local social services districts or to other public or private entities in each state which aid homeless persons, pursuant to such criteria as each state shall provide. For the purposes of this agreement, "homeless persons" shall mean undomiciled persons who are unable to secure adequate, permanent and stable housing in the States of New York and New Jersey without special assistance. The Fund shall coordinate with social service organizations of both states to ensure that resources are provided to the most cost-effective programs for the homeless and are used to address the most pressing needs in this regard. Resources of the Fund shall be provided to appropriate agencies and other organizations from each state on an equal basis.

ARTICLE IV

The Governors of New York and New Jersey agree that it is appropriate that the States of New York and New Jersey each appropriate annually to the Fund upon its establishment, through the states' respective budgets, the amounts described in this article to effectuate the intent of this agreement.

Such annual appropriation by each state shall be in an amount equal to the amount, as determined in the manner hereafter described, set forth in the certificate of its tax administrator as the total of a) all state and local tax revenues collected by that state and its localities, after deducting administrative costs, from the taxes hereafter set forth during the prior calendar year which are attributable directly to Ellis and Liberty Islands and b) the amount collected by that state and its localities, and one-half of the amount collected by joint agencies thereof, from the fees hereafter described during the same period. Such state and local taxes which shall be taken into account for the purpose of such annual appropriation are the following taxes presently or hereafter imposed by the respective states and their localities: franchise, or business privilege or like taxes on the doing of business; taxes imposed on the earnings or income of business entities (including corporations) or individuals; and sales and compensating use taxes. The fees which shall be taken into account for the purpose of such appropriation are those fees now or hereafter collected by either state or its localities, and one-half of the amount collected by joint agencies thereof, for the provision of public access to or from Ellis or Liberty Islands. The tax administrator of each state shall, for the purpose of fixing the required

amount of the annual appropriation to the Fund, certify to the legislature of his state and the Fund a) his estimate of the amount, less costs of administration, of the state and local revenues collected during the prior calendar year from the aforesaid taxes which are attributable directly to the Islands, and b) the appropriate amount of such fees collected during such period, and the appropriation to be made by each state shall be equal to the total set forth in such certification of its tax administrator. The two states shall prescribe uniform procedures and methods to be employed by the tax administrators in making the estimation of such state and local tax revenues required to be included in such certification and such other uniform procedures as may be necessary to effectuate the terms of this agreement.

For the purpose of determining revenue attribution of the above enumerated state and local taxes to Ellis or Liberty Islands the following shall apply:

1. Traditional revenue attribution. For the purposes of determining revenue attribution, if any, of any particular such state or local tax to Ellis or Liberty Island, the same method or concept with respect to allocation or attribution which is used for the purpose of determining allocation to the state or locality with respect to that particular tax as administered by the state (or locality) imposing such tax shall be applied in making the determination with respect to the Islands. In the case of sales and compensating use taxes, if the tax is occasioned by an event occurring on the Islands, the tax revenues derived therefrom shall be allocable to the Islands.

2. Other Revenue Attribution. In addition to the foregoing attribution of such state and local taxes by the method set forth in paragraph 1 above, to the extent not already included under such paragraph, the revenues collected from the following such taxes, to the extent presently or hereafter imposed by the states and their localities, shall, for the purposes of this article, be attributable directly to the Islands:

- a) State and local sales and compensating use taxes imposed with respect to (1) the provision of water, sewerage, gas, electricity, telephone or like utilities or utility services where such utilities or utility services are used or consumed on Ellis or Liberty Islands, irrespective of the facts that the delivery of such utilities or utility service occurs off the Islands, (2) the building of or the provision of access to or from Ellis or Liberty Islands, (3) the provision of sightseeing tours to, of or around Ellis and/or Liberty Islands or transportation to or from the Islands, irrespective of the fact that such tour or transportation was purchased off the Islands, (4) sales of food and beverage and other tangible personal property by providers of such sightseeing tours to their patrons or by the providers of such transportation to their passengers, (5) fuel and all other tangible personal property purchased by providers of such tours or transportation and used directly in connection with the provision of such tours or transportation. Where such sightseeing tour or transportation includes other sites or destinations, such taxes shall be apportioned;

- b) State and local sales tax imposed by either state or its localities with respect to the purchase of tangible personal property, services or other items which are used or consumed on Ellis or Liberty Islands by persons residing thereon or in connection with a trade or business conducted thereon if with respect to such use or consumption there is due and owing state and local compensating use tax;
- c) State and local franchise, or business privilege or like taxes on the doing of business or taxes imposed on the earnings or income of business entities (including corporations), in the case of business activities conducted in either state which consists of (1) providing water, sewerage, gas, electricity, telephone or like utilities or utility services where such utilities or such utility services are used or consumed on Ellis or Liberty Islands, (2) the building of or the provision of access to or from Ellis or Liberty Islands, (3) conducting tours to, of or around Ellis and/or Liberty Islands or providing transportation to or from the Islands. The portion of such state and local taxes derived from such business activities shall be attributable directly to Ellis and Liberty Islands;
- d) (1) Personal income taxes imposed by the states and their localities on other than persons residing on Ellis and Liberty Islands (i) personal income taxes imposed by the State of New York and its localities with respect to residents of the State of New York and its localities and (ii) personal income taxes imposed by the State of New Jersey and its

localities with respect to residents of the State of New Jersey and its localities, in the case of income or wages from employment or earnings from self-employment of such residents derived from employment or self-employment (A) on Ellis or Liberty Islands, and (B) with respect to the building of or the provision of access to or from such Islands or the conducting of tours to, of or around Ellis and/or Liberty Islands or the provision of transportation to or from such Islands, the portion of such state and local taxes derived from such income or wages or earnings shall be attributable directly to Ellis and Liberty Islands and (2) nonresident personal income and earnings taxes imposed by either state and its localities with respect to persons residing on Ellis and Liberty Islands, in the case of such persons paying such taxes to either state and its localities, the taxes so paid by such persons shall be attributable directly to Ellis and Liberty Islands.

/s/ Mario M. Cuomo
 Mario M. Cuomo
 Governor
 State of New York

Date: June 23, 1986

/s/ Thomas H. Kean
 Thomas H. Kean
 Governor
 State of New Jersey

Date: June 23, 1986



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IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

**BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE
COMPLAINT**

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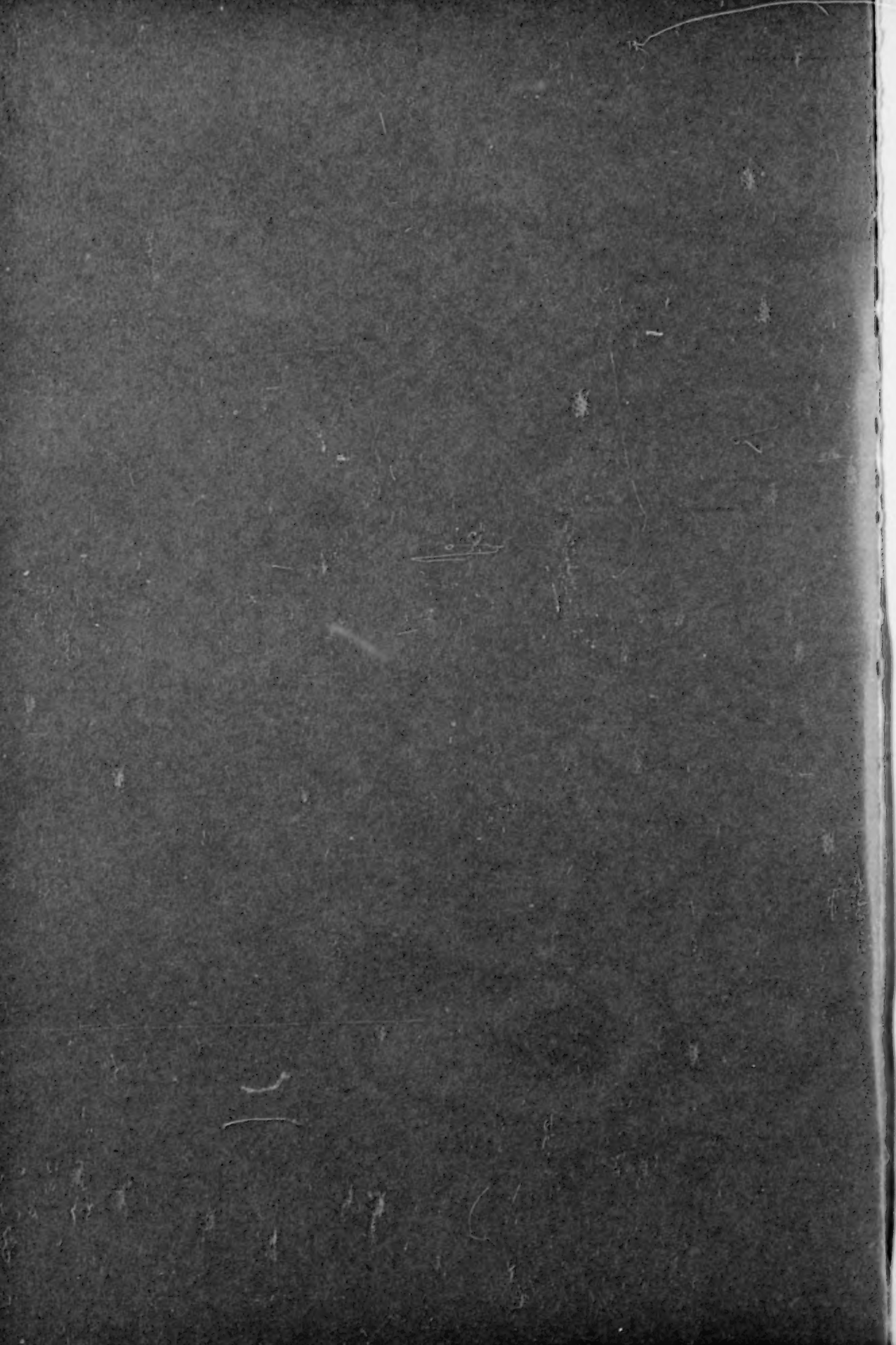
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Dated: June 17, 1993



Question Presented

Whether this Court should deny the motion of New Jersey for leave to file an original jurisdiction complaint to resolve a claim by the State of New Jersey over portions of Ellis Island, New York, where (1) New Jersey's current claim is contrary to the language of an 1834 boundary agreement between New York and New Jersey, and marks the first effort by New Jersey to exercise sovereignty over the Island in more than one hundred and fifty years; and (2) New Jersey has raised no claim or issue which cannot be addressed to administrative authorities of the United States, to which New Jersey transferred in 1904 its claim of title and jurisdiction over the subaqueous lands around the Island which form the basis of New Jersey's current complaint.

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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

**Brief in Opposition to Motion for Leave to File
Complaint**

Preliminary Statement

This brief is in response to a motion by the State of New Jersey, invoking the original jurisdiction of this Court, for leave to file a complaint seeking a declaration as to the boundary line between New Jersey and the State of New York on or around the isle located in New York Harbor and known as Ellis Island, New York. Disregarding New York's

long and unchallenged exercise of jurisdiction over the whole of Ellis Island, and ignoring recent case precedent which dispositively addressed each claim raised by New Jersey in its papers to this Court, New Jersey has requested that this Court exercise its discretionary jurisdiction to resolve a purported boundary "controversy" on two principal grounds. First, it has argued that the federal government is considering a plan for further development of the Island which might involve partial funding by a New York State authority. Second, it has claimed that the New York City Landmarks Preservation Commission might at some future time designate the Island as a New York City landmark. As we shall demonstrate below, these claims are insubstantial and fail to present a controversy warranting an exercise of original jurisdiction. Contrary to its claims, New Jersey has failed to assert jurisdiction over the Island in the past. Moreover, its current concerns over the Island's future development are addressed more properly to federal authorities who will determine that development, rather than to this Court. The motion for leave to file the complaint should be denied.

Statement of the Case

1. Colonial and Early State Jurisdiction Over Ellis Island.

On March 12, 1664, Charles the Second, King of England, granted the territory then known as New Netherlands, including what is now known as Ellis Island,¹ to the Duke of York. 1827 New York Assembly Journal 615. Title to the

¹Ellis Island has been known at various times throughout its history as, among others, Bucking Island, one of the Oyster Islands, and Ellis Island.

Island was subsequently granted to Captain William Dyre by the colonial governor of New York in the late 1670's, and devolved through various conveyances to Samuel Ellis and his heirs. Records of transfers during this time were recorded in accordance with New York law with the Registrar of New York County (Liber 13, pp. 202, 210; Liber 145, p. 432). In the late eighteenth century, the Island was a part of New York State and New York County (L. 1788, Ch. 63), and was subject to taxation by the City of New York. L. 1796, Ch. 27. In 1795 and after, New York State appropriated and expended substantial sums of money for the construction of military fortifications on Ellis and Bedloe's Islands and continually occupied them with military staff. L. 1795, Ch. 43; Public Papers of Daniel D. Tompkins, Governor of New York, 1807-1817, Vol. II, Albany, 1902, pp. 5-8, 28-31, 158-159, 197-200.

2. 1808 Conveyance to the United States.

On March 18, 1808, the New York Legislature authorized the cession of Ellis Island to the federal government for fortification purposes. L. 1808, Ch. 51. Following New York State's acquisition of the Island by condemnation, Governor Tompkins executed and delivered a deed to the United States conveying all right and title of the State to the Island. Tompkins Papers, *supra*. New York retained the right to execute civil and criminal process on the Island. See, Act of February 15, 1800 (Laws of New York, 1797-1800, p. 454); State Law § 22(3). Moreover, New York's conveyance contained an express reverter provision, set forth in chapter 51 of the 1808 Laws of New York, in the event that the Island ceased to be used for the defense and safety of the city. The deed conveying title over the Island to

the United States, dated June 30, 1808, citing portions of L. 1808, Ch. 51, conveyed

all the right, title and interest of the State of New York in and to the lands, tenements and appurtenances above mentioned and described to the United States to have and to hold the same for the purposes mentioned and expressed in the said above in part recited act.

3. The 1834 Compact.

In 1829, New Jersey brought a claim to the United States Supreme Court by New Jersey over Staten Island, the Oyster Islands, and other portions of New York Harbor. *See, New Jersey v New York*, 28 U.S. (3 Pet.) 461 (1830); 30 U.S. (5 Pet.) 284 (1831); 31 U.S. (6 Pet.) 323 (1832). In its pleadings filed in that matter, New Jersey alleged that

while [New Jersey and New York] were Colonies, New York became wrongfully possessed of Staten Island and the other small islands in the dividing waters between the two States; that the possession thus acquired by New York had been since acquiesced in, New York insisting that her possession of said islands had established her title; that New York has no other pretense of title to said islands but adverse possession * * *. *Devoe Manufacturing Company*, 108 U.S. 401, 407 (1883).

Moreover, in a series of proposals proffered by New Jersey in 1828 to resolve the dispute, that State offered to "relinquish all claims to Staten Island and the other islands in the waters between the two States now claimed and

possessed by New York." *Report of New Jersey Commissioners to Settle Question of Territory and Jurisdiction*, February, 1828 (Trenton, N.J.), pp. 15, 12, 18.

In September, 1833, commissioners representing New York and New Jersey entered into a compact to define the territorial and jurisdictional limits of each State in the harbor. The agreement was ratified by the New York and New Jersey legislatures, and was approved by the U.S. Congress on June 28, 1834. Laws of New York 1834, Ch. 8; Laws of New Jersey 1833-34, p. 118; 4 Stat. 728, Ch. 126 ("1834 Compact").

While the provisions of the 1834 Compact established the general boundary line between the two States as the middle of New York Bay (Article I), that boundary was modified by several exceptions, both general and specific. Under Article Two, New York was to "* * * retain its present jurisdiction of and over Bedlow's and Ellis' Islands * * *"; under Article Three, New York was to have "exclusive jurisdiction" over all waters of the bay and of the lands covered by said waters subject to certain rights of New Jersey. New Jersey was to have the "exclusive right of property" to the land under the water lying west of the middle of the bay; it was also to have the "exclusive jurisdiction over the wharves, docks and improvements on the shore or attached to such docks or wharves." The Compact did not limit New York's sovereignty over Ellis Island to a fixed geographic dimension.

4. New York Transfer of Title Over Subaqueous Lands.

On May 7, 1880, the New York State Legislature enacted Chapter 196 of the Laws of 1880, which relinquished title

and jurisdiction to the United States over certain lands covered with water in New York Harbor, including lands surrounding Ellis Island. That grant of jurisdiction contained express limitations, providing that

the jurisdiction hereby ceded shall continue no longer than the United States shall own said lands at Governor's Bedloe's, Ellis' and David's Islands . . . and the adjacent lands covered with water, herein described and hereby released; and provided, further, that all civil and such criminal liability as may lawfully issue under authority of this State may be served and executed over said released lands.

New York's Governor Alonzo B. Cornell executed letters patent transferring title over those subaqueous lands to the United States on May 26, 1880.

5. New Jersey Transfer of Title and Jurisdiction Over Subaqueous Lands.

On November 30, 1904, the Riparian Commissioners of the State of New Jersey,² acting pursuant to authority vested with them by the New Jersey State Legislature, executed a deed transferring title to the land beneath the waters around Ellis Island to the United States of America. The "price or reasonable compensation to be paid to the State for said lands" was determined by the Commissioners to be one thousand dollars. Pursuant to the deed, New Jersey

²The Riparian Commissioners were Governor Franklin Murphy, William Cloke, Robert Williams, W.F. McLaughlin, and John R. Reynolds.

does hereby grant, sell and convey, unto the said THE UNITED STATES OF AMERICA, all the right, title, claim and interest of every kind, of the State of New Jersey

to those lands, together with "all and singular the hereditaments and appurtenances thereunto belonging",

TO HAVE AND TO HOLD all and singular the above granted and described lands under water and premises unto the said UNITED STATES OF AMERICA, in fee simple, for ever.

No conditions, use limitations, or reservations of rights of any sort were contained in the deed.

Portions of the subaqueous lands transferred in 1904 were filled and built upon between 1890 and 1927, augmenting the size of the Island to its present extent of approximately 27.5 acres.

6. New York's Continuous Exercise of Jurisdiction Over the Island.

Subsequent to the approval of the 1834 Compact, New York's jurisdictional exercise over the entire Island continued unabated. Ellis Island was and continues to be placed in New York County and New York City by express provisions of the New York Revised Statutes issued subsequent to 1835 (Revised Statutes of the State of New York [1836], Part I, Chap. II, Title I, § 5; Title V, § 1), as well as the New York Consolidation Act of 1882 (L. 1882, Ch. 410, § 1), the Greater New York Charter (L. 1897, Ch. 378; L. 1901, Ch. 466, § 1; Ash & Ash, *Greater New York Charter* [1902 ed.],

pp. 956, 980), and the Administrative Code of the City of New York (§ 2-202[1]). Both the 1894 and the 1938 New York State Constitutions place the Island in one of the State Senate Districts (Art. III, § 3). The Island has been a component of New York Congressional Districts and State Senate and Assembly Districts for more than one hundred and fifty years.³ As a part of the County of New York, it lies within the jurisdiction of the United States District Court for the Southern District of New York. 28 U.S.C. § 112. It is contained within the jurisdiction of the New York City Courts (Ash & Ash, p. 774), lies within New York's First Judicial District (New York State Constitution, Art. VI, § 6), and is under the jurisdiction of the New York State Supreme Court, First Department. *Rettig v John E. Moore Co.*, 90 Misc. 664 (App. Term, 1st Dep't, 1915) (civil action for assault committed "upon government property at Ellis Island").

Since 1938, Ellis Island has been expressly treated as a subdivision of the Borough of Manhattan whose residents are required to comply with the sales tax rules and regulations issued by the City. *First Annual Compilation of the Rules and Regulations of New York City Agencies* (1938-1939) 52; 1 *Cumulative Compilation of the Rules and Regulations of New York City Agencies* 582 (1967).

Since at least 1910, the federal government has treated the full extent of Ellis Island as part of New York State for United States Census purposes. Laidlaw, *Population of the City of New York, 1890-1930*, pp. 53, 85; U.S. Department

³Currently, Ellis Island is part of the twenty-fifth State Senate District, and the sixty-second State Assembly District. State Law, §§ 121, 124.

of Commerce, Bureau of the Census, *Housing* (Supplement to the First Series Housing Bulletin for New York, Census of 1940), Manhattan Tract Block 9; U.S. Department of Commerce, Bureau of the Census, *Census Tract Statistics, New York, New York* (1952), Part 5 ("Tracts in Manhattan Borough"). In 1940, for example, the Island's 717 inhabitants were treated as Manhattan residents for reapportionment and other census purposes; in 1990, the six inhabitants of New York Tract 0001, Block 101—which includes the full extent of Ellis Island—were treated identically. The Department of Commerce also recognizes Ellis Island as part of the Borough of Manhattan, and as part of the 15th Congressional District of New York, as established on September 27, 1983. Bureau of the Census, *Congressional District Atlas, Districts of the 100th Congress*. Consequently, throughout its history Ellis Island's residents have voted in New York's elections, been subject to New York's laws, been eligible to enjoy New York's social and other services, and been treated for all purposes as citizens of this State.

7. The *Collins* Litigation.

The single federal case authority which examines the propriety of jurisdictional claims over Ellis Island is the recent decision of the Second Circuit in *Collins v Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992). *Collins* was a tort action filed by an employee of the United States who, while operating a stump grinding machine on the landfilled portion of Ellis Island, received injuries requiring amputation of his lower leg. Plaintiff Collins brought an action in the United States District Court for the Southern District of New York against Promark, the manufacturer of the grinding machine, to recover damages for personal injuries sustained in the accident. Promark impleaded the United States in a third-party action, alleging negligence in training and supervision of Collins and failure to

provide safe apparel and a safe working environment. 956 F.2d at 385. Seeking to escape this liability, the United States argued in a motion for summary judgment that the third-party action was barred by the New Jersey Workers' Compensation Law, which limited an employer's liability for work-related accidents where the employee, like Collins, received workers' compensation benefits. 956 F.2d at 386. Promark argued in opposition that the Workers' Compensation Law of New York provided no such protection to the employer and that New York's law governed the entire extent of Ellis Island, including landfilled areas. Following an examination of extensive documentation addressing interests over the Island, including the 1834 Compact, the District Court (Knapp, J.) found that the full extent of the Island was within the exclusive jurisdiction of New York under the terms of the Compact. *Collins v Promark Products, Inc.*, 763 F. Supp. 1204 (S.D.N.Y. 1991), *aff'd upon reconsideration*, 763 F. Supp. 1206 (S.D.N.Y. 1991). Upon certification of the district court's orders, the Second Circuit granted to the United States permission to appeal.

The States of New Jersey and New York each participated as *amicus curiae* on this appeal before the Second Circuit. New Jersey filed a detailed brief fully supporting the position of the United States seeking reversal of the district court.

On appeal, the Second Circuit affirmed. Noting that the Compact Commissioners "[s]urely . . . must have contemplated that the territory of the Island might over the years decrease or increase as a result of natural or artificial forces", the Court found that Article II of the Compact confirmed New York's jurisdiction over the *entity* known as Ellis Island, without regard to its metes and bounds. 956 F.2d at 386-87. It found as well that the Compact expressly distinguished between New Jersey's proprietary and sovereign rights over

subaqueous land west of the state boundary line in New York Harbor, and New York's distinct and specific jurisdiction over the whole of Ellis Island above the waves. 956 F.2d at 387. The court noted that the phrase "present jurisdiction" (956 F.2d at 387)

only acknowledged that [federal] government ownership carried with it some limited form of federal jurisdiction. It did *not* acknowledge any jurisdiction on the part of New Jersey, which never exercised any authority or control of any kind with respect to the Island.

The court cited various features of the lengthy and uncontroverted exercise of jurisdiction over the whole of the Island by New York for more than three centuries, including at all times since the land around the Island was filled (956 F.2d at 387):

Ellis Island remains a part of New York by acknowledgment of the government and without objection (except in this case) by New Jersey. It has been a component of New York Congressional, State Senate and Assembly districts for more than one hundred fifty years. As part of New York County, it lies within the territorial jurisdiction of the United States District Court for the Southern District of New York, 28 U.S.C. § 112, and of New York's first judicial district, N.Y. Const. art VI, § 6; see *Rettig v. John E. Moore Co.*, 90 Misc. 664, 154 N.Y.S. 124 (N.Y. App. Term 1915) (civil suit for assault committed "upon government property at Ellis Island"). The government treats the entire area of Ellis Island as part of Manhattan for census purposes and has assigned a New York postal zip code to the Island. Those who have resided on Ellis

Island, both before and after the Compact, have been treated as citizens of New York.

Such long acceptance of the status quo "counts for a great deal in matters of territorial disputes between states". 956 F.2d at 388 (citing *Georgia v South Carolina*, 487 U.S. 376 [1990]; *Arkansas v Tennessee*, 310 U.S. 563, 569-71 [1940]; *Michigan v Wisconsin*, 270 U.S. 295, 306-08 [1926]; *Indiana v Kentucky*, 136 U.S. 479 [1890]).

The court noted as well that the division of the Island in the fashion suggested by New Jersey and the federal government would create a "haphazard and uneven" boundary line, and would occasion extensive future litigation in tort matters. 956 F.2d at 388. Finally, the court found that no case law cited by New Jersey and the federal government in support of their interpretation of the Compact addressed the issue of jurisdiction over Ellis Island. 956 F.2d at 388-389. It concluded (956 F.2d at 389):

The Compact does not provide for jurisdiction over lands created by fill. It does provide for jurisdiction over Ellis Island. New York is the jurisdiction provided.

The federal government did not seek review of the Second Circuit's decision by filing a petition for writ of certiorari before this Court.⁴

⁴On March 26, 1993, an order of settlement was entered in the *Collins* matter in the United States District Court for the Southern District of New York.

8. The Current Matter.

On April 26, 1993, the State of New Jersey filed with this Court a motion for leave to file a complaint, a complaint, and a supporting brief seeking relief including, *inter alia*, a declaration that the boundary line between New York and New Jersey on Ellis Island is

the former mean high water line of the original natural island, approximately 3 acres in size, so that the original island is thereby declared to be within the territory and jurisdiction of the State of New York, and so that the balance of the island, approximately 24.5 acres in size, and the surrounding waters, are thereby declared to be within the territory and jurisdiction of the State of New Jersey Complaint, p. 15.

ARGUMENT

Although it is beyond cavil that this Court has jurisdiction to determine boundary disputes between States, U.S. Constitution, Art. III, Sec. 2, Cl. 1; 28 U.S.C. § 1251(1); *Virginia v West Virginia*, 220 U.S. 1 (1911), original jurisdiction should be used only sparingly, *Wyoming v Oklahoma*, 502 U.S. —, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992), and should not be employed in the absence of absolute necessity. *Louisiana v Texas*, 176 U.S. 1, 15 (1900). This Court has substantial discretion to make judgments on a case-by-case basis as to the necessity of original jurisdiction. *Texas v New Mexico*, 462 U.S. 554 (1983). As this Court recently noted (*Mississippi v Louisiana*, 506 U.S. —, 113 S. Ct. 549, —, 121 L. Ed. 2d 466, 471 [1992]):

Determining whether a case is "appropriate" for our original jurisdiction involves an examination of two factors. First, we look to "the nature of the interest of the complaining State," [citation omitted] focusing on the 'seriousness and dignity of the claim,' [citation omitted]. "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v New Mexico, supra*, at 571, n 18, 77 L. Ed. 2d 1, 103 S. Ct. 2558. Second, we explore the availability of an alternative forum in which the issue tendered can be resolved. [citation omitted.]

Applying these factors, this Court should decline to accept original jurisdiction in the matter at bar. New Jersey has neither alleged an interest sufficient to describe a serious current controversy with New York in the instant matter, nor has it demonstrated potential conflicts which cannot be addressed in other judicial fora.

POINT I

New Jersey has alleged no facts constituting a current controversy between the States requiring this Court's exercise of original jurisdiction.

In the instant matter, New Jersey has failed to allege facts constituting a serious current controversy with New York requiring this Court's exercise of original jurisdiction. The

complaint does not allege that New Jersey is currently being directly harmed by any actions taken by New York; nor does it allege current actions by New York challenging New Jersey's territorial integrity. Instead, New Jersey's complaint is purportedly based upon longer-standing claims arising under the 1834 Compact. New Jersey asserts that it "has been attempting for many decades to resolve the issues concerning Ellis Island without success", which efforts, according to its Brief,⁵ "have involved state and federal officials, including United States Senators, United States Congressional Representatives, local officials, and the Governors of both states." Brief, p. 20. It asserts as well that immediate resolution of the Ellis Island jurisdictional issue is required because New York State, as a result of the *Collins* decision, is attempting "to expand its governmental authority over the filled portion of Ellis Island." Brief, p. 20. This latter allegation is rooted in two factual claims, allegedly of recent origin: (1) New York currently has an "imminent plan for the development of the filled portion of Ellis Island" (Brief, p. 16); and (2) the New York City Landmarks Preservation Commission has held hearings at which the possibility of having the Island declared a city landmark was discussed (Brief, p. 17).

These claims by New Jersey are inaccurate, overstated, and insufficient to state a controversy which warrants an exercise of jurisdiction by this Court. We will address them in turn.

⁵References to the "Brief" are to New Jersey's Brief in Support of Motion for Leave to File Complaint, filed with its Motion and Complaint in this matter.

- A. Contrary to New Jersey's assertions, the complaint does not arise from a failure of New Jersey's attempts to resolve Ellis Island issues "for many decades".**

New Jersey's claim that it seeks leave to file its complaint in this matter after efforts "for many decades" to resolve the issues concerning Ellis Island is erroneous. A significant finding of the Second Circuit in *Collins* was the determination that "Ellis Island remains a part of New York by acknowledgment of the [federal] government and without objection (except in this case) by New Jersey". 956 F.2d 383 (2d Cir. 1992). That finding was based upon careful analysis of an extensive record of public documents in which New York's authority over the Island was clearly asserted, including federal census and election districts, the New York State Constitution, New York State boundary statutes, federal and state court jurisdictional statutes, case law, the New York City Charter, and other documents. These claims of jurisdiction extended across several centuries, and included the whole of the Island at all times. Throughout this period, Ellis Island residents have voted in New York's elections, been subject to New York's laws, and been eligible to enjoy New York's social and civil services, without challenge from New Jersey.

Attempting to divert attention from this lengthy history of acquiescence to New York's sovereignty, and in an effort to persuade this Court to exercise its original jurisdiction, New Jersey has argued that the State and its citizens "have publicly asserted the sovereignty claim of the State of New Jersey to the filled portion of Ellis Island many times over the years after 1904 . . ." (Brief, p. 10). As evidence of these sovereign claims, New Jersey has cited various actions and statements by New Jersey citizens and public

officials, as well as several actions by a New Jersey local municipality. These alleged assertions of jurisdiction, as described by New Jersey in its Brief, include: a visit to the Island by New Jersey state officials in 1956 (Brief, p. 11); a visit to the Island by the Mayor of Jersey City in 1962 (Brief, p. 12); a letter from a New Jersey congresswoman to a federal official in 1934 regarding federal employment practices on the Island (Brief, pp. 10-11); a letter from a New Jersey state official to a regional federal official in 1955 (Brief, p. 11); a comment by a New Jersey state official in 1960 (Brief, pp. 12-13); a telegram from a New Jersey State Senator to several New Jersey congressional representatives in 1958 (Brief, p. 12); a single ambiguous statement by the Jersey City Corporation Counsel before a congressional subcommittee in 1962 (Brief, p. 13);⁶ Jersey City's placement of "Ellis Island" on its tax rolls as assessed property from 1890 to the present, with tax exempt status (Brief, p. 10); Jersey City's enactment of a zoning ordinance applicable to "Ellis Island" in September, 1963, to take effect only if the Island were sold to private interests (Brief, p. 14); a concession in answer filed by the State of New Jersey in an action commenced against it and New York State by private citizens of New Jersey in 1985 (Brief, p. 14); and a 1986 Memorandum of Understanding between the Governors of New York and New Jersey which made no

⁶New Jersey cites in its Brief the remark of Corporation Counsel Meyer Pesin that "Jersey City may well claim preemptive governmental jurisdiction over Ellis Island. . . [.] To put it simply, in other words, the city of Jersey City may look upon Ellis Island as within the proper boundaries of the city and subject to its jurisdiction," and proffers this single ambiguous assertion as a claim of "the interests of the City in the filled portion of Ellis Island" during three days of hearings on the disposal of Ellis Island in 1962. Brief, p. 13.

claim by New Jersey of jurisdiction over any part of Ellis Island (Brief, p. 15).

These alleged assertions of jurisdiction are facially insufficient to establish a claim over the Island warranting this Court's exercise of original jurisdiction. Indeed, they are irrelevant to any purported formal claim by the State of New Jersey over the Island. Conspicuously lacking in this list are instances of legislative or sovereign action by that State over any portion of the Island remotely comparable to the electoral, judicial, tax, and other claims made by New York. These random and isolated claims of jurisdiction simply do not amount to an attempt by New Jersey "for many decades to resolve the issues concerning Ellis Island without success", as claimed in the Brief (p. 20). They comprise instead stark evidence of the lengthy indifference of New Jersey to the Island in the face of extensive claims by New York during this period.

B. New York is not expanding its jurisdiction over the filled portion of Ellis Island in consequence of the *Collins* decision.

Contrary to New Jersey's claim, New York is not expanding its jurisdiction over the filled portion of Ellis Island in consequence of the *Collins* decision. As we have noted above, New York's exercise of jurisdiction over the Island has long and unchallenged precedent. More significantly, however, in its effort to encourage this Court to exercise its original jurisdiction over this matter, New Jersey has misstated the current state of development of the Island.

New Jersey's claim that New York has an "imminent plan" for the development of the filled portions of the Island is

simply incorrect and is controverted by the very allegations of the complaint and memorandum in support. The Complaint alleges that the National Park Service plans to "present for public comment in the near future plans by the Center Development Corporation of New York for the renovation of three existing buildings on the filled area of the island" (Brief, p. 17). Clearly no such plan has yet been formally proposed by the Park Service for public examination; current comments upon the contents of such a plan are purely speculative. Furthermore, the Center Development Corporation, the alleged architect of this so-called "imminent plan" (Brief, p. 17), is a private corporation without power to act on behalf of the State of New York. No state action has been taken to endorse or fund any plan which may be proposed by the Center Development Corporation. No steps have been taken by the New York State Dormitory Authority to issue bonds to fund any such Corporation plan.

Moreover, while we do not concede the accuracy of New Jersey's allegations about a purported Center Development Corporation plan, the mere proposal of a plan for Park Service examination and public comment would pose no basis for a claim of controversy between the States of New York and New Jersey in any case. The Park Service might well determine that any such plan was not meritorious for a variety of reasons. Given the uncertainty of future action by the federal government, New Jersey's invocation of this Court's jurisdiction is premature.

Finally, New Jersey's claim that prospective development of the Island would violate New York State law if funded in part by Dormitory Authority bond proceeds (Brief, pp. 17-18) is simply irrelevant. The Authority's compliance with New York State law, though a matter of importance to

New York, poses no basis for an exercise of jurisdiction by this Court.

New Jersey's claim addressing recent purported hearings by the New York City Landmarks Preservation Commission is similarly insufficient to justify an exercise of original jurisdiction by this Court. The Complaint does not allege that any decision by the Landmarks Preservation Commission has been issued concerning any area over which New Jersey purports to lay claim. Until such issuance, the claim and complaint are simply premature.

POINT II

This Court should decline to exercise its jurisdiction on grounds of judicial economy.

In addition to New Jersey's failure to set forth a current controversy over Ellis Island warranting exercise by this Court of its original jurisdiction, principles of judicial economy strongly recommend a refusal to exercise jurisdiction in this matter. As this Court has noted, even the presence of a justiciable controversy does not require the Court to exercise its jurisdiction. *Illinois v City of Milwaukee*, 406 U.S. 91, 93-94 (1972). A necessary precondition of such exercise is the unavailability of another forum to resolve the dispute. *California v Texas*, 457 U.S. 164, 169 (1982). In the instant matter, New Jersey's effort to invoke this Court's original jurisdiction to address a claim of injury based on the future development of the Island and public discussions about its landmark qualities is inappropriate in light of that State's long-standing concession of sovereignty and jurisdiction over the Island and its surrounding waters to the United

States. As New Jersey concedes in her brief, the State sold the lands beneath the waters surrounding Ellis Island to the United States in 1904 for "reasonable compensation" and with the approval of the New Jersey State Legislature. Pursuant to Article I, Section 8, Clause 17 of the United States Constitution,⁷ such a purchase vested the United States with the power of "exclusive legislation" over the Island vis-a-vis New Jersey. Absent any express limitation in the conveyance, this power of exclusive legislation is tantamount to complete sovereignty and provides the federal government with exclusive jurisdiction over the purchased area. *Fort Leavenworth Railroad Company v Lowe*, 114 U.S. 525, 532-33 (1885). Consequently, New Jersey's claim of injury based on future development of the Island and its status as a landmark addresses property which that State does not own, over which it has ceded its jurisdiction, and which is in the full control of the United States government. Under such circumstances, we submit, New Jersey should address its concerns over future economic development of the Island not to this Court, but to federal authorities which control that development. Decisions by those authorities may then be addressed properly in the lower courts and submitted to this Court only after those courts have fully and fairly

⁷Art. I, Sec. 8, Cl. 17 provides that the Congress shall have the power

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority of all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

reviewed the matter. In this fashion, the resources of this Court will be expended with optimum economy.

CONCLUSION

The motion for leave to file the complaint should be denied.

Dated: Albany, New York
June 17, 1993

Respectfully submitted,

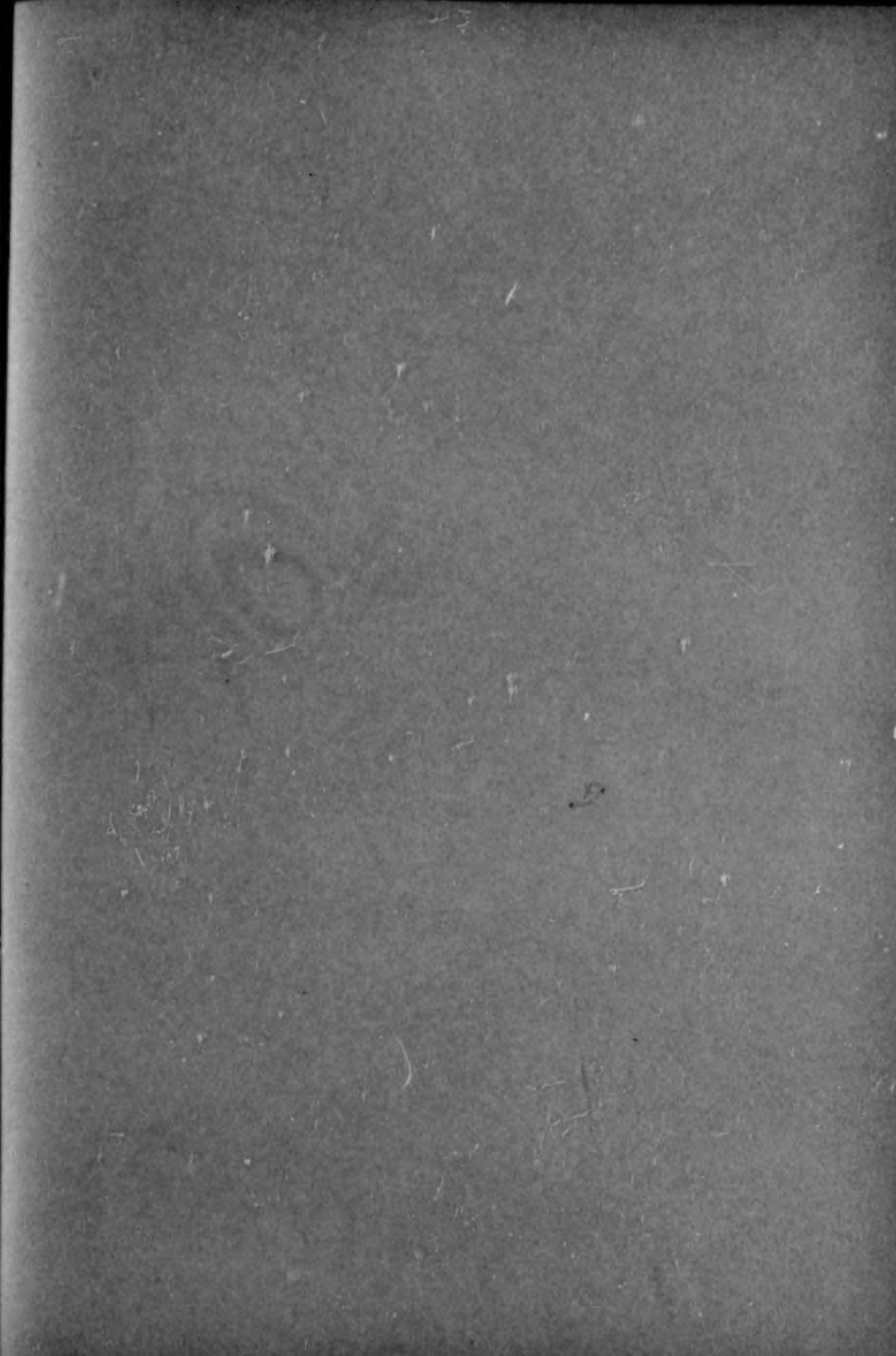
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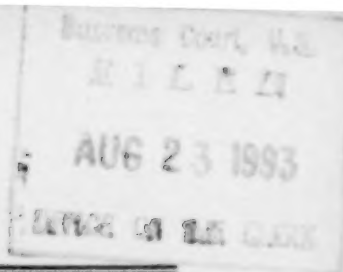
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(3)
No. 120 Original



In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**REPLY BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE COMPLAINT**

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No. 120 Original

In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**REPLY BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE COMPLAINT**

JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States and under Title 28, United States Code, Section 1251(a).

**CONSTITUTIONAL PROVISION AND
STATUTES INVOLVED**

United States Constitution, Art. III, § 2, cl. 2

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

28 U.S.C. 1251(a), Original jurisdiction

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

4 Stat. 708, the 1834 Compact between New Jersey and New York (see Appendix of New Jersey's Brief in Support of Motion for Leave to File Complaint.)

**STATEMENT OF FACTS AND
PROCEDURAL HISTORY**

This is a suit under the Court's original and exclusive jurisdiction seeking to resolve a longstanding dispute between the State of New Jersey and the State of New York as to the location of their common boundary on Ellis Island, in the Hudson River and in Upper New York Bay.

The State of New Jersey filed its Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint on April 26, 1993. New York filed its response on or about June 26, 1993. This is the brief of the State of New Jersey in reply to New York's brief.

LEGAL ARGUMENT

NEW JERSEY'S MOTION FOR LEAVE TO FILE A COMPLAINT SHOULD BE GRANTED BECAUSE NEW JERSEY HAS A CLAIM OF SUFFICIENT SERIOUSNESS AND DIGNITY TO WARRANT CONSIDERATION BY THE COURT AND BECAUSE ONLY THIS COURT HAS THE JURISDICTION TO RESOLVE BOUNDARY DISPUTES BETWEEN TWO SOVEREIGN STATES

The Court in *Mississippi v. Louisiana*, 506 U.S. ___, ___, 113 S.Ct. 549, 552, 121 L.Ed.2d 466, 471 (1992), identified the two factors that are to be considered in ruling on a motion for leave to file a complaint by one state against another state invoking the original jurisdiction of this Court. The Court must consider the interests of the complaining state, focusing on the "seriousness and dignity" of the claim. The Court must also consider whether there is an alternative forum in which the issue tendered can be fully resolved. New York maintains in its answering brief that New Jersey has neither alleged an interest sufficient to describe a current controversy with New York nor has New Jersey demonstrated potential conflicts which cannot be addressed in other judicial fora (NYb14). Notwithstanding New York's arguments, there does presently exist a serious conflict requiring resolution and only the Supreme Court of the United States has the authority to resolve this matter.

A. New York's Contention that New Jersey Has Exhibited "Lengthy Indifference" to New York's Assertion of Jurisdiction Over the Whole of Ellis Island is Without Merit Because New Jersey Never Acquiesced in New York's Claim of Jurisdiction.

New York suggests that there is no serious dispute concerning jurisdiction over Ellis Island because of what New York characterizes as New Jersey's "lengthy indifference" to New York's assertion of sovereignty over the island. In support of this argument, New York provides the Court with an extended history of Ellis Island, beginning its discussion in 1664. Much of this historical summary is wholly irrelevant to this dispute. As was made clear in New Jersey's brief, throughout the colonial period and into the early years of the 20th century, Ellis Island consisted of only three acres of land. In 1834, New Jersey and New York entered into a compact which recognized New York's jurisdiction over those few acres, but recognized as well that New Jersey had ownership and sovereignty over all of the underwater lands to the west of the midline of the Hudson River, including the underwater lands immediately surrounding Ellis Island. The issue in this case concerns the sovereignty over the 24.5 acres of underwater lands immediately surrounding the three-acre island that were filled in the years 1898 through 1934 to expand Ellis Island to its present size. Thus, New York's historical recitation concerning events that predated the 1834 Compact and the filling of the underwater lands is wholly irrelevant.

In addition, the argument that New Jersey has been largely indifferent to New York's so-called continuous

exercise of jurisdiction over the island is simply belied by the facts. It is important to recognize that for the past century Ellis Island has been owned and maintained by the federal government. Federal control has afforded neither New Jersey nor New York substantial opportunity to exercise sovereign power over the island. Now that private development of the filled portion of Ellis Island is imminent, the question of whether New Jersey or New York is sovereign over these lands is a matter of immediate and grave concern. New York notes that under its law Ellis Island has been in certain New York election districts, and that Ellis Island residents have been considered by New York subject to its own tax and criminal statutes. However, the mere sporadic enactment of these laws does not necessarily establish as a matter of historical or evidentiary fact that New York has actually exercised authority over the filled portions of Ellis Island.

Moreover, there has been no showing by New York that it actually enforced its laws with respect to individuals residing on the filled portions of the island or activities occurring on lands claimed by New Jersey. Indeed, New York has never presented any proof that Ellis Island residents actually voted in New York or that those residents were living on the filled portion of the island.*

* New York argues that the United States Census still counts the residents of Ellis Island as residents of Manhattan County. (NYb9). The Census did count six inhabitants of Ellis Island in 1990. However, the United States Attorney in *Collins v. Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992) advised the Court that the Census was incorrect. The United States Attorney said that Ellis Island had no inhabitants in 1990, and has had none since 1954, when the Government immigration facility there was

Likewise New York has not presented any evidence that Ellis Island residents paid taxes to New York based on taxable events occurring on the filled portions of the island. There has been no showing by New York that Ellis Island residents who lived on the filled portions of the island enjoyed the benefits of New York's social service programs or were prosecuted in the New York courts under the laws of New York for crimes committed on land New Jersey claims as its own. Again, given the pervasive presence of the federal government on the island, it is doubtful whether New York's actions in regard to the filled lands were more than *de minimus*.

On the other hand, public officials of the State of New Jersey, its citizens and others have publicly asserted New Jersey's claim to the filled portion of Ellis Island on numerous occasions over the years since 1904. New York has not alleged, nor could it allege, that New Jersey's state government took any official action in this time to relinquish New Jersey's claim to the filled portions of the island. *New Jersey v. Delaware*, 291 U.S. 361, 376, 54 S.Ct. 407, 412, 78 L.Ed. 847, 854 (1934); *Illinois v. Kentucky*, 500 U.S. ___, ___, 111 S.Ct. 1877, 1882, 114 L.Ed.2d 420, 429-430 (1991) (illustrating official state actions waiving a sovereignty claim). With the closure of the immigration station on the island in 1954, and the consideration by the federal government of plans for private commercial use of the island, the issue of whether New York or New Jersey had jurisdiction over Ellis Island became a matter

closed. With the prospect of development of Ellis Island, there is the potential for full time residents on the Island again, a fact underscoring the importance of resolving the issue in this case.

of greater interest. It was nevertheless widely recognized that New Jersey continued to resist New York's claim to sovereignty. As *The New York Times* reported in its March 14, 1956 edition:

The United States bought Ellis Island from New York State in 1808. New Jersey has always contested the Empire State's ownership, contending that while the island was a mile off the Battery it was only 900 feet from the Jersey shore.

New Jersey's claims of sovereignty to a major portion of Ellis Island were also reported in the September 29, 1956 issue of *Business Week*, in the February 15, 1958 edition of *The New Yorker* and in the September 4, 1960 edition of the *Newark Evening News*. The last article discussed the potential sale of the island for commercial development but stated that the new owners will have an "unprecedented problem of jurisdiction." New York and New Jersey both claim the island and both "are prepared to fight for it."

New Jersey's claim to sovereignty over the filled portion of Ellis Island was also the subject of discussion in the United States Congress. On July 30, 1955, H.R. 3120, a bill authorizing the appointment of a New York City National Shrines Advisory Board, was considered by the House of Representatives. During the debate on that bill, Representative Thomas J. Tumulty of New Jersey stated, "I am not going to prolong the discussion, but Jersey City claims that Ellis Island, in particular, is within the confines of Jersey City." *Congressional Record*, July 30, 1955, at 12387. His objection to the bill blocked its passage in the House at that time. A companion bill, S.732, was considered on August 1, 1955. Representative George Klein of New York responded to Congressman Tumulty's

objection, and stated that New Jersey residents would be allowed to serve on the proposed Board. *Congressional Record*, August 1, 1955, at 12703. Congressman Tumulty withdrew his reservation of objection, and the bill thereupon passed. The bill was approved August 11, 1955. Pub. L. No. 341 c. 779, 69 Stat. 632.

Not only was New Jersey's claim a matter of public record, it was also a claim that has been recognized by the federal government. On February 11, 1963, the General Counsel of the General Services Administration rendered an opinion on the legal status of Ellis Island. The opinion was written by Special Assistant to the General Counsel Henry H. Pike and approved by General Counsel J. E. Moody. The opinion concluded that, although the federal government had title to the entire island, New York had sovereignty over the original three-acre island, and New Jersey had sovereignty over the 24.5 acres of filled lands that were added to the original island. The opinion stated:

... [T]he artificial filling in around the original island, about 3 acres in size, did not operate to change the sovereignty over the filled-in area as sometimes occurs in the case of accretion or erosion. *The filled-in area remains, for the purpose of applying the provisions of the 1833 compact, as if it were "land under water" lying west of the middle of the bay and river, which under Article Third has been consistently held to be a part of New Jersey.* The "land under water" is consistently treated throughout the 1833 compact as including lands below the low-water mark. It follows logically that, for the purpose of the 1833 compact, the term "Ellis Island" includes all the area above the low-water mark at the time the compact was

entered into. *The area below that low-water mark, including the filled-in area, is a part of the State of New Jersey.* [Pike, Henry H., *Ellis Island - Its Legal Status* (General Services Admin., Office of General Counsel, Opinion No. 143, GSA-WASH/DC 63-10835, February 11, 1963, pages 3-4). (Emphasis added.)]

New York was fully cognizant of this opinion, as evidenced by Governor Nelson Rockefeller's statement before the United States Senate Subcommittee on Intergovernmental Relations on September 4, 1963. *See Newark Evening News*, September 5, 1963.

Not only was New York aware of the opinion of the General Services Administration which endorsed New Jersey's claims to the filled portion of the island, New Jersey's claim also was recognized as valid in a July 24, 1963 statement in the House of Representatives by John V. Lindsay, then a member of Congress from New York, who was later Mayor of the City of New York. Congressman Lindsay had introduced legislation concerning the use of Ellis Island. In a statement in support of the legislation, Congressman Lindsay stated that the 24 acres of fill on Ellis Island "were never New York property, but, as subaqueous territory, pertained to the jurisdiction of New Jersey." *Congressional Record*, July 24, 1963, at 13300.

The same point was made in 1965 when the House of Representatives debated House Joint Resolution 454, which provided for the development of Ellis Island as part of the Statue of Liberty National Monument. A member from the State of New York commented that Ellis Island was in New York State, but that assertion was

quickly countered by New Jersey Congressman Cornelius H. Gallagher:

I would like to point out for the benefit of the House, that the gentleman from New York [Mr. Farbstein] is not altogether right when he states that Ellis Island is in his district - 3.4 acres of it is in his district while the other 24 acres of Ellis Island are in my district, the 13th Congressional District of the State of New Jersey. The island is filled in with land taken from New Jersey . . . [*Congressional Record*, July 12, 1965, at 16377.]

It is important to emphasize that the federal government has never abandoned the position reflected in the GSA opinion of 1963. In fact, the federal government asserted this same position in the *Collins* matter before the federal district court and the Court of Appeals for the Second Circuit.

Most recently, in 1986, Governor Thomas H. Kean of New Jersey and Governor Mario Cuomo of New York signed a Memorandum of Understanding allotting income from Ellis Island and Liberty Island equally to the homeless of both states. The New York Legislature never adopted legislation to implement the agreement, and for this reason New Jersey deems the Memorandum a nullity. Nevertheless, this was a substantial recognition by New York's Chief Executive of the continuing vitality of New Jersey's sovereignty claims to the filled portion of Ellis Island.

The historical record thus completely refutes New York's assertion that there is "stark evidence" of "lengthy indifference" on the part of New Jersey to New York's

"extensive" claims to jurisdiction (NYb18). The fact of the matter is that the record does not reflect any "extensive" claim by New York. Rather, the record before this Court reflects a paucity of actions by New York at a time when the federal government dominated activity on Ellis Island. New York did little, if anything, and New Jersey never acquiesced in New York's spurious claim to control over the filled portions of the island.

Taken together, such actions as are detailed here, and in New Jersey's Complaint, starting in 1904 and continuing until 1993, constitute repeated notice to New York of New Jersey's sovereignty claims to a major portion of Ellis Island. In nearly every decade since the filling was completed in 1935, New Jersey, its citizens and others, have called New Jersey's claims to Ellis Island to New York's attention. This is not "long silence and acquiescence", *Indiana v. Kentucky*, 136 U.S. 479, 512, 10 S.Ct. 1051, 1054, 34 L.Ed. 329, 333 (1890), but rather a continuous boundary dispute of the type recognized in *New Jersey v. Delaware*, *supra*, 291 U.S. at 376-7, 54 S.Ct. at 412, 78 L.Ed. at 855. The historical record recounted here, and not available to the Second Circuit Court of Appeals in *Collins v. Promark Products, Inc.*, *supra*, supports the position that New Jersey has used many reasonable avenues over the years since the filling was completed in 1935 to make its claim heard. As a direct result of these objections, New York's own Executive and Congressional leaders have in recent years recognized the validity of New Jersey's sovereignty claim to the filled portion of Ellis Island.

B. New York's Assumption of Sovereignty Over All of Ellis Island Has Meant in Recent Years that Sales, Business, and Income Taxes Due New Jersey Have Not Been Paid and The Planned New Development of the Island In New York's Asserted Exclusive Dominion Will Further Deny New Jersey Its Sovereign Right to Control and Share in This Development.

New York's argument that there is no current controversy between New Jersey and New York over Ellis Island must fail as well. Initially, it must be noted that Ellis Island has been open as a National Park Service facility for several years and has been staffed by federal and private concession employees during that time. Sales taxes and income taxes, as well as other taxes, have been, and continue to be, collected. Some of these revenues may properly belong to New Jersey. That alone should be enough to establish a real dispute between the two states.

Moreover, New Jersey alleged in its Complaint that the National Park Service plans to consider a development soon to be proposed for the filled portion of Ellis Island. (Complaint ¶4). New York does not deny that there may be such plans (NYb19), but it merely says that these plans may not be submitted or may be rejected (*Ibid.*). New Jersey has since learned from the National Park Service that its Director has allowed the proposal of the Center Development Corp. of New York to proceed for public review. As noted in New Jersey's Complaint, ¶4, the New York State Dormitory Authority has recently considered financing the Center Development project, according to the Deputy Executive Director of the Authority. See *Crain's New York Business*, January 11, 1993,

page 1. The National Park Service will discuss Center Development's proposal with officials of New Jersey and New York, and with leaders of various private non-profit organizations concerned with the development of the Island, during September 1993. Probably in October 1993, the National Park Service will submit Center Development's proposal for a sixty-day public review. 16 U.S.C. 470f. Thereafter, the plan, probably with revisions, will be adopted, and the redevelopment of the filled area of Ellis Island will begin.

The point which New Jersey seeks to make by reference to this plan, or to any revised plan, is that the filled area of Ellis Island not now occupied and used by the National Park Service is a prime site for further development. Moreover, and most importantly, development of that part of the island is under consideration *now*. New York would have New Jersey wait until the development plans for the filled portion of Ellis Island are a *fait accompli* before any of New Jersey's concerns become a live controversy. That could delay the development of the island.* Instead, this Court ought to resolve this boundary dispute *now*, so that both States, their officials,

* New Jersey is reminded of what a developer stated during a February 7, 1958 tour of Ellis Island. The General Services Administration then planned to sell the island, and gave a tour of the island to potential private buyers. According to the *Newark Evening News*, February 9, 1958, a developer on the trip recognized that the disputed sovereignty claims created a problem for him in formulating plans and bid proposals, "If it's New Jersey's, you might be able to run something here. But [if Ellis Island is in] New York? The taxes would kill you before you started."

regulatory agencies, taxing authorities, private developers, and all other affected persons will know which State's laws apply.

Indeed, with development of the island, it is anticipated that people will again live on Ellis Island. It is essential that the Court decide under which state laws these people will reside. Where will these individuals vote? Which state's family laws will apply? Which state's taxes will be paid? Which state should supply social services? These are only a few of the myriad of issues that will arise as the island is developed and repopulated.

It serves neither state's interests to delay a decision on the boundary on Ellis Island. The property is on the brink of a new and expanded era of development. A decision now will assist in that process, and will advance the interests of the citizens of New Jersey, New York, and indeed, the entire Nation.

C. There is No Other Forum Which Can Resolve the Issue of Where the Proper Boundary Should Be Located Between New York and New Jersey on Ellis Island. Federal Officials Cannot Decide Tax or Regulatory or Civil or Criminal Law Issues, Only the United States Supreme Court Has That Power.

Another point made by New York in its brief is that New Jersey has another forum to bring its complaint concerning its sovereignty over the filled portion of Ellis Island. That forum is to bring the issues "to federal authorities which control that development" planned for

Ellis Island (NYb21). While it is true that federal authorities have primary control over development on land that the Government owns, what is at issue here is State sovereignty over the same land, not merely ultimate control of development. That sovereignty decision is exclusively the province of this Court. *Mississippi v. Louisiana*, *supra*. Federal authorities cannot determine which State's income or business taxes to collect, nor which State's civil and criminal laws to apply, nor which State's insurance and construction laws should be enforced. These are matters of serious concern to both States and to potential developers on Ellis Island. Federal control cannot resolve these issues – only this Court's intervention can, and New Jersey believes that this Court should act now, and allow the filing of New Jersey's Complaint.

D. The Second Circuit Court of Appeals Decision In *Collins* Did Not Settle the Boundary Dispute on Ellis Island and Under 28 U.S.C. § 1251(a) That Court Did Not Have the Authority to Do So.

In support of its position that all of Ellis Island is within its sovereign jurisdiction, New York relies in large measure on the Second Circuit's decision in *Collins v. Promark Products, Inc.*, *supra*. That matter involved a worker's compensation claim arising from an injury which occurred on Ellis Island. The court decided that New York law should apply to resolve the dispute, even though the accident occurred on the filled portion of the island, on lands New Jersey claims as its territory. The Court of Appeals based its decision on a completely erroneous interpretation of the 1834 Compact. The Court

determined that the framers of the Compact intended that New York would have jurisdiction over the entity called Ellis Island, no matter what its eventual size, and contemplated that such jurisdiction would extend to any filled lands.

As New Jersey stated in its main brief, neither the district court nor the Court of Appeals had before it any of the legislative history concerning the Compact of 1834, 4 Stat. 708 (NJb46). That history, especially the boundary agreement between the two states in 1888, conclusively demonstrates that filling of shorelands was not meant to change the boundary between New Jersey and New York as determined in the 1834 Compact. (NJb45-48). The river bottom on the New Jersey side of the Hudson River was acknowledged as New Jersey land before the filling of the shorelands, and the Boundary Commission of 1888 adjusted for the filling which had occurred between 1834 and 1888 in setting the final boundary line. (NJb47). The Boundary Commission would not have needed to do so if either state could have expanded its lands by filling. In 1888, both States recognized that their intent was that filling of the River and Bay would not expand their boundaries. Thus, it is clear that the *Collins* opinion is grounded on a fundamental error.

There is, moreover, an equally serious flaw in New York's attempt to use the Second Circuit's decision as a boundary determination between New Jersey and New York on Ellis Island. It is the prerogative of this Court, and not the lower federal courts, to decide boundary issues between the States. Under 28 U.S.C. § 1251(a), this Court has original and *exclusive* jurisdiction of all controversies between two States. The rule in State boundary

disputes was recognized early in the history of our country, *Fowler v. Lindsay*, 3 U.S. 411, 1 L.Ed. 658 (1799), and down to more recent times. *Durfee v. Duke*, 375 U.S. 106, 115-116, 84 S.Ct. 242, 247-248, 11 L.Ed.2d 186, 193 (1963).

In *Georgia v. South Carolina*, 497 U.S. 376, 392, 110 S.Ct. 2903, 2913, 111 L.Ed.2d 309, 327 (1990), the Court refused to regard a Fifth Circuit Court of Appeals decision as one which fixed a boundary: "In any event, this Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved."* This issue was recently addressed in *Mississippi v. Louisiana, supra*, wherein Mississippi argued that this Court's refusal to allow Louisiana to file an original complaint to determine the boundary between the two States must, by implication, have indicated that the District Court was the proper forum for the resolution of that question. *Id.*, 506 U.S. at ___, 113 S.Ct. at 552, 121 L.Ed.2d at 471. The Court squarely held that 28 U.S.C. § 1251(a), deprived the district court of jurisdiction to entertain Louisiana's third party complaint against Mississippi. *Id.*, 506 U. S. at ___, 113 S.Ct. at 551, 121 L.Ed.2d at 470.

In the face of this unbroken line of cases, the Second Circuit's decision in *Collins v. Promark Products, Inc., supra*, cannot be regarded as fixing the boundary on Ellis Island between New Jersey and New York. New York's reliance upon *Collins* is therefore misplaced. Moreover,

* The only exception to a decision by this Court is the alternative of a negotiated settlement of any dispute between the states over the location of a boundary. U.S. Const. Art. I, § 10. *Durfee v. Duke, supra*, 375 U.S. at 116 n. 15, 84 S.Ct. at 247, 11 L.Ed.2d at 194.

because the Court of Appeals did not have before it any of the legislative history of the Compact of 1834 or the 1888 Report of the Boundary Commissioners, it was in error in deciding that New York law governed the disposition of the claim. This Court should allow the filing of New Jersey's Complaint to make clear that the Second Circuit's erroneous decision does not represent the final resolution of the dispute over the boundary on Ellis Island.* The filing of the Complaint should be permitted so that this Court can delineate the boundary between the two states.

CONCLUSION

Ellis Island in New York Harbor was expanded to its present size by artificial filling of land on the New Jersey side of the Hudson River and New York Bay. That filling did not change New Jersey's sovereignty over the filled land: the filled land of Ellis Island remained part of New Jersey. Since the completion of the filling in 1935, New

* Indications of the early misuse of the decision of the Court of Appeals are not hard to find. The New York City Landmarks Preservation Commission had delayed making a decision on city landmark status on all of Ellis Island because of the jurisdictional dispute between New Jersey and New York. Ms. Traci Rozhon, a Commission spokeswoman, was recently quoted as saying, "The second the [Collins] decision was reported she [Commissioner Laurie Beckelman] jumped right in because she very much wanted the city involved in decisions on Ellis Island." The newspaper report erroneously referred to the Collins decision as "giving the Big Apple undisputed jurisdiction over Ellis Island." *The Sunday Star Ledger*, November 15, 1992, p. 23.

Jersey's federal, state and local officials have continually brought this dispute to the attention of New York. In 1963, the federal government itself recognized in a detailed opinion that a major part of Ellis Island was in New Jersey. The same year a New York Congressman recognized the validity of New Jersey's sovereignty claim there. In 1986, New York's Governor recognized the validity of New Jersey's claims of sovereignty and signed a Memorandum of Understanding equally apportioning the revenue from Ellis Island between both States. The boundary controversy between New Jersey and New York should be resolved now so that imminent potential development can take place without the uncertainty an unclear boundary will generate. No other forum exists to determine state boundary disputes but this Court. The federal authorities involved are without the power to take such action. Accordingly, the State of New Jersey seeks leave from this Court to file its Complaint against the State of New York.

Respectfully submitted,

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August 20, 1993

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(H)

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IN THE
Supreme Court of the United States

October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

**MOTION FOR LEAVE TO FILE SUR REPLY BRIEF
AND
SUR REPLY BRIEF FOR DEFENDANT STATE OF NEW YORK**

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Dated: September 14, 1993



No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE SUR REPLY BRIEF

Defendant State of New York respectfully moves for leave to file the attached sur reply brief in opposition to plaintiff State of New Jersey's motion for leave to file a complaint in this matter.

This additional brief is required to correct several misstatements and misimpressions contained in New Jersey's reply brief to this Court. Acceptance of this brief will facilitate the Court's thorough consideration of the issues

critical to the decision as to whether leave to file a complaint is appropriate.

Accordingly, the State of New York respectfully requests that its motion for leave to file a sur reply brief in opposition to the motion for leave be granted.

Dated: Albany, New York
September 14, 1993

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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

Sur Reply Brief for Defendant State of New York

This brief is in response to a reply brief filed by the State of New Jersey in support of its motion for leave to file a complaint seeking a declaration as to the boundary line between New Jersey and the State of New York on or around the island located in New York Harbor and known as Ellis Island, New York.

ARGUMENT

New Jersey's contrary arguments notwithstanding, it has not raised a claim meriting this Court's exercise of its original jurisdiction.

Despite the arguments raised in its reply brief,¹ New Jersey fails yet to assert a claim of sufficient seriousness and dignity warranting this Court's exercise of its original jurisdiction. *Mississippi v Louisiana*, ____ 506 US ____, 113 S Ct 549, 552, 121 L Ed 2d 446, 471 (1992).

New Jersey has offered several erroneous and inconsistent arguments in its opposition to New York's claim that we have exercised long and unchallenged jurisdiction over Ellis Island, a jurisdiction keenly recognized by the Second Circuit in its decision in *Collins v Promark Products, Inc.*, 956 F2d 383 (2d Cir 1992). First, New Jersey has argued that the historical control of the Island by New York during the period between 1664 and "into the early years of the 20th century" was "wholly irrelevant to this dispute" because the Island was only several acres in size during that period. NJ R Br p 4. This view simply misses the point. New York's exercise of jurisdiction over the whole of the Island vis-a-vis New Jersey—including portions added by fill after 1898—has continued undiminished during a period of more than three centuries, including the last eight decades. This lengthy and unbroken exercise is certainly relevant to the matter at bar. Indeed, New Jersey concedes as much later in its brief, where it argues—wrongly—that the *Collins* court did not have before it "any of the legislative history of the

¹Numbers in parentheses preceded by "NJ R Br" refer to pages in New Jersey's Reply Brief in Support of Motion for Leave to File Complaint, served on August 20, 1993.

Compact of 1834 or the 1888 Report of the Boundary Commissioners", and that, in consequence of this evidentiary lacuna, *Collins* was wrongly decided.² NJ R Br p 18.

In an effort to excuse its lengthy indifference to Ellis Island, New Jersey has also argued for the first time in its reply brief that "Federal control has afforded neither New Jersey nor New York substantial opportunity to exercise sovereign power over the island." NJ R Br p 5. This claim is absurd, and again misses the point of New York's argument. The federal government has owned the entirety of Ellis Island since 1808. As we described more fully in our main brief, New York *has* exercised its sovereign power over the Island in a variety of substantial ways since that time, including open territorial and jurisdictional claim over the entire Island, despite this federal ownership. The claim that New Jersey had no opportunity to exercise jurisdictional claims in a similar fashion during this period is simply incredible.

We have addressed New Jersey's paucity of claims of sovereignty over portions of Ellis Island in our main brief. Its citation of several new sources—*Business Week*, *The New Yorker*, and the *Newark Evening News* (NJ R Br p 7)—are equally insubstantial. The 1963 internal legal memorandum of the federal General Services Administration cited as authority for New Jersey's claim (NJ Br p 8-9) is typically

²Contrary to New Jersey's claim, the *Collins* court had before it extensive documentation of the full proprietary history of Ellis Island, including the 1834 Compact and its antecedents. Both the United States of America as third-party defendant, and New Jersey as *amicus curiae*, made extensive arguments based upon the 1834 Compact in *Collins*. Those arguments were considered and rejected by the Second Circuit. 956 F2d at 386-87.

incompetent: New Jersey has not explained and cannot explain how this internal opinion by a federal agency represents a sovereign act of New Jersey over the Island.³ The citation of Congressman Lindsay's comment in the Congressional Record (NJ R Br p 9), which merely acknowledges that New Jersey at one time owned the subaqueous land around the Island, is likewise irrelevant.

New Jersey's argument that the 1986 Memorandum of Understanding between the governors of New York and New Jersey, proposing the creation of a fund for the benefit of the homeless of both States funded by tax income from business activity relating to Liberty and Ellis Islands, somehow recognized a sovereign claim by New Jersey over Ellis Island (NJ R Br p 10) is a fanciful revision of the history and language of that Memorandum. The Memorandum, which the New York Legislature never endorsed and which New Jersey itself concedes is "a nullity" (NJ R Br p 10), was signed in 1986, after many decades of inactivity by New Jersey towards the filled portions of the Island. In signing the document, Governor Cuomo in no manner conceded the legitimacy of any current claim of sovereignty by New Jersey. Rather, he rightly found that avoidance of litigation over even a belated and meritless claim,⁴ if achieved through the establishment of a program to benefit the home-

³We note that both New Jersey and the federal government presented the GSA opinion to the Second Circuit in *Collins*. We note further that the Justice Department apparently chose not to seek certiorari of the adverse ruling in *Collins* to this Court—although the cross-claim against the Federal Government in that matter would have been dismissed if the GSA position were found to be correct.

⁴At the time the Memorandum was signed, New Jersey had not raised a claim to or sought to litigate jurisdiction over Ellis Island. (Footnote continued on next page.)

less of both New York and New Jersey, was desirable in light of the "noble meaning and spirit" represented by Ellis and Liberty Islands. This highminded vision of the Island cannot be transformed into a territorial or jurisdictional cession.

Finally, New Jersey has repeated its allegation that the New York State Dormitory Authority has recently considered participation in a proposal for development of Ellis Island issued by the Center Development Corp., a private corporation. NJ R Br pp 12-13. While we have addressed the insubstantiality of that claim in our main brief (p 19), we note now as well that the Dormitory Authority will not participate in the Center Development Corp. proposal.

In sum, the facts and arguments raised in New Jersey's reply brief provide no persuasive foundation for this Court's exercise of original jurisdiction in this matter.

(Footnote continued.)

Several private citizens from New Jersey were concurrently attempting unsuccessfully to litigate the issue in *Guarini v State of New York*, 521 A2d 1362 (NJ Chan Div 1986), *aff'd*, 521 A2d 1294 (NJ App Div 1986), *certif den*, 526 A2d 157 (1987), *cert den*, 484 US 817 (1987). As the *Guarini* Court itself pointed out, this litigation by private parties cannot be viewed as an assertion of sovereignty by the State of New Jersey. 521 A2d at 1369-71.

CONCLUSION

The motion for leave to file the complaint should be denied.

Dated: Albany, New York
September 14, 1993

Respectfully submitted,

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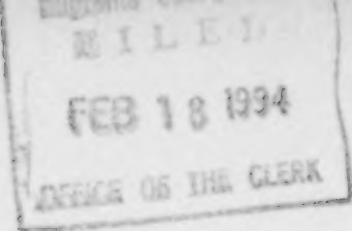
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5
No. 120, Original



In the
Supreme Court of the United States

October Term, 1993

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**SUPPLEMENTAL BRIEF
IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT**

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PROCEDURAL HISTORY

New Jersey is seeking to invoke the Court's original and exclusive jurisdiction in order to resolve a longstanding dispute between New Jersey and New York as to the location of their common boundary on Ellis Island, which lies in the Hudson River and in Upper New York Bay. New Jersey filed a Motion for Leave to File Complaint, Complaint, and Brief in Support of that motion, on April 26, 1993. New York filed its Brief in Opposition on June 24, 1993. New Jersey filed a Reply Brief on August 23, 1993. On October 4, 1993, the Court invited the Solicitor General to file a brief setting forth the position of the United States on the matter. The Solicitor General has not yet filed a brief.

New Jersey now is filing a Supplemental Brief in order to bring the Court's attention to new and significant facts that bear importantly on the pending motion.¹

STATEMENT OF FACTS

The issue raised in this matter is whether 24 of the 27½ acre island called Ellis Island is part of New York or New Jersey. As indicated in New Jersey's Brief in Support of Its Motion to File Complaint, the 1834 compact between New York and New Jersey fixed the boundary between the states at the mid-point of the Hudson River. All of the land under the waters of the river to the west of that line was owned by and was subject to the sovereignty and jurisdiction of New Jersey. Although Ellis Island was on the New Jersey side of the boundary line, the 1834 compact provided that the island, then a mere three acres, would be subject to the then-present jurisdiction of New York. In the years from 1890-1934, some 24 acres of land surrounding the original

¹ Since this is a supplement to the briefs previously filed by New Jersey, New Jersey relies on the questions presented, jurisdictional statement, constitutional and statutory provisions involved and summary of argument set forth in its earlier submissions.

island were artificially filled. New Jersey maintains that those 24 acres of filled underwater lands are part of New Jersey and remain subject to its sovereignty and jurisdiction.

New Jersey has alleged in its proposed Complaint that there is a pressing need for the prompt and final settlement of this controversy. Complaint ¶3. In support of this position, New Jersey pointed out that the decision in Collins v. Promark Products, Inc., 956 F.2d 383 (2d Cir. 1992), wherein the Second Circuit Court of Appeals ruled in a worker's compensation case that Ellis Island is subject to New York's jurisdiction, was being improperly relied upon by New York to expand its governmental authority over those portions of the island created by artificial filling, portions of the island which New Jersey maintains is under its sovereign jurisdiction. Complaint ¶3. The Complaint states as follows concerning this attempted expansion of authority by New York over the whole of Ellis Island:

For example, on or about November 10, 1992, the Landmarks Preservation Commission of the City of New York held hearings on the question of whether the whole of Ellis Island should be declared a city landmark. In taking that action, the Commission is relying upon extending the Collins decision to all matters involving state jurisdiction over the entire island. [Complaint, ¶3].

The hearings were reported in The Sunday Star Ledger, (Newark, N.J.) November 15, 1992, p.23. The news report also quoted a member of the Landmarks Commission as relying upon the Collins decision as a basis for convening the hearings on the landmark status of the entire island. Ibid.

In its brief in opposition, New York appeared to deny that there were any hearings at all and argued that even if hearings had been held, no decision had yet been rendered

by the Landmarks Commission. Therefore, New York maintained that New Jersey's complaint was premature. In its brief, New York stated:

New Jersey's claim addressing recent purported hearings by the New York City Landmarks Preservation Commission is similarly insufficient to justify an exercise of original jurisdiction by this Court. The Complaint does not allege that any decision by the Landmarks Preservation Commission has been issued concerning any area over which New Jersey purports to lay claim. Until such issuance, the claim and complaint are simply premature. [Brief of the State of New York at page 20].

The New York City Landmarks Preservation Commission has now acted. On November 16, 1993, it designated all of Ellis Island as a historic district of the City. The New York City Planning Commission held a public hearing on the matter on January 5, 1994. The Planning Commission adopted the Report of the Landmarks Preservation Commission at its meeting on January 19, 1994. On February 7, 1994, the New York City Council's Land Use Committee's Subcommittee on Landmarks, Public Siting and Maritime Uses held a public meeting concerning the designation of Ellis Island as a historic district. On February 9, 1994, the New York City Council approved the Landmarks Preservation Commission's designation.²

² If the Court grants the motion for leave to file its complaint, New Jersey intends to amend its complaint to include these additional factual assertions.

LEGAL ARGUMENT

THE RECENT ACTION OF THE LANDMARKS COMMISSION OF THE CITY OF NEW YORK AND THE CITY'S MUNICIPAL COUNCIL DECLARING THE WHOLE OF ELLIS ISLAND A HISTORIC DISTRICT OF THE CITY UNDERSCORES THE NEED FOR THE COURT TO EXERCISE ITS ORIGINAL JURISDICTION IN THIS CASE.

The procedure for actions within the Court's original jurisdiction is governed by Sup. Ct. R. 17. The rule does not expressly provide for the filing of supplemental briefs with respect to a pending motion for leave to file an original action. The Court's rules do, however, permit the filing of supplemental briefs at any time while a petition for a writ of certiorari is pending "calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing." Sup. Ct. R. 15.7. See also Sup. Ct. R. 18.9 and 25.5. The rules, and the objectives they are designed to serve in adequately informing the Court of material intervening events, thereby make it appropriate to file a supplemental brief with regard to a pending motion for leave to file an original action under Sup. Ct. R. 17. New Jersey is accordingly filing this supplemental brief to bring to the Court's attention intervening matters that bear importantly on the pending motion.

As indicated in the papers previously filed by New Jersey in support of its motion, there is a compelling need for the Court to entertain this case to definitively resolve the issue of whether the filled portions of Ellis Island are within New Jersey's boundaries, subject to its laws and

jurisdiction, or whether these properties are part of New York. In support of this contention, New Jersey specifically noted that the New York City Landmarks Commission was taking steps toward the designation of the whole of Ellis Island as a city historic district. Even though the Landmarks Commission had already held hearings on the matter, New York cavalierly dismissed New Jersey's concerns by referring to the Commission's proceedings as "purported" hearings. New York further maintained that until the issuance of a designation of landmark status by the City's Landmark Commission, the claim and the complaint are "simply premature." (Brief of the State of New York, p. 20).

The Landmark Commission has now acted. On November 16, 1993, the Commission declared the whole of Ellis Island to be a historic district of the City of New York. Its action has been approved by the City Council. The designation covers some thirty interconnected structures, many of which are built upon the 24 acres of filled land that New Jersey claims in this matter. Although New Jersey does not believe that its claim and complaint were premature at the time New Jersey's pending motion was filed with this Court, even New York would now have to agree that this case is not premature.

It should be added that the public statements by the Chair of the Landmarks Preservation Commission indicate that the Commission's action was motivated by the present consideration of plans for the development of Ellis Island by the National Park Service. As mentioned in our previously filed papers, the federal government has been considering a proposal to develop the island. The spokesperson for the Landmarks Commission reportedly stated that after the decision of the Second Circuit in Collins, the Chair of the Commission "jumped right in" because "she very much

wanted the City involved in decisions on Ellis Island." The Sunday Star Ledger (Newark, New Jersey), November 16, 1993. The view of Chair Laurie Beckelman was reflected in a report in The New York Times:

Two years ago, an official from the National Park Service supported a plan to raze twelve buildings on the 27.5 acre island to make way for a \$145 million conference center. But public opposition killed the plan. Ms. Beckelman said yesterday that the city's landmark designation would give it more influence in the future to oppose similar proposals. [The New York Times, November 17, 1993, at p. B4, column 1].

The City's actions are apparently not intended to forestall all development of the island but, rather, are directed at providing the City with a greater say in the manner in which the island is developed. See "Council Joins 2-State Fight Over Ellis I.," The New York Times, February 9, 1994, at p. B1, quoting City Councilwoman June M. Eisland as having said, "It brings us to the table in any discussions having to do with the island."

Actions by the City of New York and the statements of its officials amply support the reasons given by New Jersey for the Court to exercise its original jurisdiction in this case. Plans for the development of Ellis Island are under consideration by the federal government. Armed with an incorrect and non-binding opinion by the Court of Appeals for the Second Circuit, New York City is taking new and expansive steps in the exercise of its sovereign jurisdiction over the whole of the island. The Court should determine whether New York City can appropriately take such actions over lands subject to New Jersey's laws.

In summary, New York's actions make abundantly clear that there is a need for the exercise of original jurisdiction by the Court. The boundary between the two states on Ellis Island is in doubt and there is a critical need for a definitive ruling by the Court. Surely, this matter requires the attention of the one court in the land that is empowered to resolve these important issues and settle this dispute over jurisdiction of one of this nation's most historic sites.

CONCLUSION

For the reasons stated herein, and those set forth in New Jersey's previous briefs, the motion for leave to file a complaint should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF NEW JERSEY,
Plaintiff,
v.

STATE OF NEW YORK,
Defendant.

OFFICE OF THE SPECIAL MASTER

SUPPLEMENT TO
FINAL REPORT OF THE SPECIAL MASTER

May 30, 1997

PAUL R. VERKUIL
Special Master

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IN THE
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OCTOBER TERM, 1996

No. 120, Original

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF NEW YORK,
Defendant.

OFFICE OF THE SPECIAL MASTER

**SUPPLEMENT TO
FINAL REPORT OF THE SPECIAL MASTER**

BACKGROUND

A. Introduction

This Supplement to the Final Report of the Special Master ("Final Report") (Mar. 31, 1997) (Docket Item No. 385) describes in metes and bounds terms the remedy I recommended to the Court in my Final Report. To review briefly, I recommended that a boundary be drawn on Ellis Island dividing the sovereign states of New Jersey and New York based upon the following considerations.

First, I proposed "that the Court grant to New York sovereignty over the original or 1833 Ellis Island to the

low-water mark thereof.” Final Report at 154. Second, for what I considered compelling reasons, I found “that the 1857 United States Coast Survey map advocated by New Jersey for use in delineating the boundary on Ellis Island most accurately depicts the size and shape of the original Ellis Island to the MLW [mean low-water] mark.” *Id.* at 156. The 1857 map is reproduced at Appendix I attached to the Final Report. I relied upon the testimony of New York’s experts to accord New York 4.69 acres, the size they estimated for Ellis Island to the MLW mark in 1857. *Id.* at 160-61. To this figure, I added one half of the pier that is shown on an 1819 map included in Appendix J of the Final Report. I found New York’s testimony convincing that at least half of that pier, or 0.2 acres, had been undergirded by fill before the 1834 Compact was executed. *Id.* at 158-59. The acreage accorded New York was thus 4.89 acres. I also found that the current size and shape of Ellis Island is most accurately depicted by a 1995 survey by New Jersey expert Louis J. Marchuk introduced at trial and accepted by New York (the “1995 Marchuk Survey”). *Id.* at 159-60.

Having determined what the boundary should be according to the law, I concluded it was appropriate to recommend invocation of equitable principles of flexibility and practicality to create a workable boundary. I analyzed several potential methods for drawing that boundary, including a “template” approach achieved by placing over the 1995 Marchuk Survey a transparency of the 1857 map. I rejected this approach, finding it had the following major disadvantages: the boundary would (1) intersect and partition buildings, particularly the Main Building housing the National Immigration Museum; (2) be impractical and inconvenient; (3) insert a strip of New Jersey’s territory between New York and the heavily utilized ferry slip; (4) deny New York access to and authority over the land around the Main Building; and (5) separate sovereignty over the outdoor eating area attached to the Main Building from sovereignty over the

Main Building. *Id.* at 162-63. For all of these reasons, I recommended that the MLW acreage of 4.89 acres to be accorded New York be reconfigured into a boundary that would best accommodate a situation of divided sovereignty.

To achieve “the most practical, convenient, just, and fair boundary line consistent with the language of the 1834 Compact and applicable law,” *id.* at 164, I recommended that the Court accord New York 4.89 acres by means of a boundary line that intersected none of the three buildings which would have been divided by the template approach, and that would ensure New York’s sovereignty over the land between the Main Building and the ferry slip, the outdoor eating area adjacent to the restaurant within the Main Building, and an appropriate swath of land around the Main Building. *Id.* at 164-66. My recommended boundary before the metes and bounds survey was depicted at Appendix K attached to the Final Report.

My Final Report contemplated “[t]he final stage in this proceeding,” namely “to draw New York’s portion of Ellis Island on a map . . . and then to have the States jointly survey that area so as to produce for the Court a metes and bounds description capable of immediate implementation once this proceeding is final.” *Id.* at 13. After such a survey exercise by the States, I proposed to render a recommended survey of the precise boundary line. The following description and Designated Survey of my recommended boundary line (“the boundary”) on Ellis Island is filed pursuant to that mandate. This supplement thus completes paragraph 3 of the proposed Decree issued in conjunction with the Final Report. *See id.* at 170.

B. Procedural Steps

Immediately following the filing of my Final Report, the Office of the Special Master requested New Jersey and New York each to conduct surveys of the boundary on

Ellis Island and to report the results of these surveys. On April 9, 1997, New Jersey requested access from the National Park Service ("NPS") for the purposes of conducting a survey on Ellis Island on Monday, April 14, 1997. Letter from New Jersey Deputy Attorney General Robert A. Marshall to NPS Deputy Superintendent Lawrence Steeler (Apr. 9, 1997) (Docket Item No. 386). On April 10, 1997, New York urged me to delay the conduct of the surveys until after the filing of exceptions. New York suggested it was "premature and not without prejudice" to require a survey at this juncture. Letter from New York Assistant Attorney General Judith T. Kramer to Special Master Paul R. Verkuil at 1 (Apr. 10, 1997) (Docket Item No. 387).

1. April 10, 1997 Telephone Conference

On April 10, 1997, I convened a telephone conference in order to gauge the parties' progress in completing the surveys and to address New York's concerns and any other questions stemming from the Final Report. *See* Tr. 4/10/97 at 3-4 (Docket Item No. 395). Mr. Yannotti, on behalf of New Jersey, and Ms. Kramer, on behalf of New York, participated. *Id.* at 2.

The conference served three principal functions. First, I clarified an apparent source of confusion on the part of New York with regard to the parameters of the boundary to be surveyed. In the Final Report, I explained that the boundary should be drawn as described therein and as depicted in Appendix K as nearly as possible to encompass an area of 4.89 acres. Final Report at 166. I further noted, however, that the designated acreage was somewhat flexible. *Id.* The purpose of this flexibility was not to expand New York's borders but to ensure that if more than 4.89 acres were needed to encompass the boundary described in Appendix K it could be exercised accordingly. Needless to say, having drawn my recommended boundary by using scales from two maps of differing ages, I could not be sure that my estimated 4.89 acre description would stand up to the survey process.

During the telephone conference, New York stated that she had not understood the Final Report in that respect; instead, she apparently believed the Final Report accorded the parties some discretion in reshaping the boundary and re-estimating the MLW mark upon which the 4.89 acre area is based. Tr. 4/10/97 at 9-16. In explaining the intent of that part of the Final Report, *id.* at 7-16, I emphasized that the task of having the boundary surveyed was to be a "ministerial," rather than discretionary, undertaking, *id.* at 4, 10.

Second, the telephone conference was intended to establish a deadline for the parties to complete surveys. New Jersey estimated that she would have a survey completed by April 21. *Id.* at 7, 14. New York explained that although she had not yet hired a surveyor, she would do so, and would provide a survey within a matter of weeks. *Id.* at 5, 17.

The third function of the conference was to clarify that I would invite no further testimony regarding the recommended boundary. *Id.* at 9-10, 13-14. (Subsequently, New York misapprehended the point of the survey exercise. She did not conduct a survey, and did seek to introduce further testimony at the May 14, 1997 conference among the parties).

On April 22, 1997, New Jersey served New York and the Office of the Special Master with two draft surveys, designated "A" and "B," and a letter discussing minor variances between the descriptions contained in the Final Report concerning the boundary and the surveys on the ground. Letter from New Jersey Assistant Attorney General Joseph L. Yannotti to Special Master Paul R. Verkuil (Apr. 22, 1997) (Docket Item No. 390).

On May 7, 1997, New York sent four draft maps prepared by her experts Drs. Lawrence Swanson and Donald Squires to New Jersey and the Special Master. The transmittal letter accompanying the maps explained that they were drawn as overlays on New Jersey's survey and the

1857 map and were expressly “intended to show alternative ways to implement the specific findings” of the Final Report. Letter from New York Assistant Attorney General Judith T. Kramer to Special Master Paul R. Verkuil at 1 (May 7, 1997) (Docket Item No. 391). Because two of the four maps submitted by New York partitioned the Main Building, they were amended by a later letter to avoid that flaw. Letter from New York Assistant Attorney General Judith T. Kramer to Special Master Paul R. Verkuil (May 9, 1997) (Docket Item No. 392). At the May 14, 1997 hearing held on Ellis Island and discussed below, revised maps were presented by New York to incorporate the entire Main Building within New York. Maps Introduced into the Docket by New York (May 14, 1997) (Docket Item No. 393).

2. May 14, 1997 Conference on Ellis Island

On May 14, 1997, I convened a conference on Ellis Island in order to analyze New Jersey’s surveys of the boundary and to determine which survey to include in the proposed final Decree to be submitted to the Court. Tr. 5/14/97 at 3-4 (Docket Item No. 394). New Jersey’s surveys were the only ones available to me, because New York produced no survey. In addition to the States of New Jersey and New York, the City of New York and the Preservation Amici, *see* Final Report at 18, were represented at the conference. Tr. 5/14/97 at 2.

The conference resolved all remaining issues. At my request, New Jersey’s surveyor, Mr. Louis D. Marchuk, first led the conference participants on a walk along the points of his surveys of my recommended boundary. He explained the small differences between the two surveys he prepared on behalf of New Jersey and answered questions posed by New York, the amici, and the Special Master. *Id.* at 5-8. All participants had a clear understanding of how the surveys would work in practice.

After this exercise, no one disputed the accuracy of the survey, and New York expressly stated that she had “[n]o

objections as to the way in which Mr. Marchuk executed the lines on [Surveys] A and B as he's explained them." *Id.* at 9.

Given the choice between Surveys A and B, the State of New York and the Preservation Amici preferred Survey A. In particular, counsel for the Preservation Amici highlighted the impracticability of Survey B, whose boundary in places hugs the Main Building:

MR. KERR [for the Preservation Amici arguing for the state of New York]:

The principal concern we have with Plan B . . . as it follows the line of the wall of the main building, as we understand it, about a foot or so from the base of the building, it is not sufficiently far away from the building to make the entire building within New York and specifically the eaves would overhang into New Jersey, so we think that's a very practical problem.

Secondly, in terms of any work on the building on the exterior, you would, in effect, have scaffolding in New Jersey in order to work on the building in New York

Tr. 5/14/97 at 13. The statement echoed my principal concern in designing the recommended boundary in the first place. *See* Final Report at 163. For her part, New Jersey stated she was willing to accept either survey. Tr. 5/14/97 at 15. New Jersey had offered two surveys pursuant to my request. Survey B literally expressed the 4.89 acre limitation, while Survey A created a more workable boundary by adding slightly to the acreage (5.1 acres). As New Jersey presumably understood in offering these surveys, Survey A better met the purposes of my earlier description in Appendix K, even though it did not exactly comply with the literal 4.89 acre dimension, as expressed in Survey B. New Jersey's submissions were therefore exactly what I had requested.

As indicated, the State of New York produced four corrected maps, instead of surveys, *id.* at 4-5, which depicted proposed reconfigurations of the boundary, *id.* at 16, 42. In addition, New York attempted to introduce testimony by one of her trial experts, Dr. Swanson, concerning these four maps and another early map prepared in 1841. *Id.* at 24. I ruled such testimony out of order. *Id.* at 40.

Having examined the surveys prior to the conference; addressed relevant questions raised during Mr. Marchuk's tour and description of the boundary; heard other testimony and argument; and reaffirmed on the ground the practicalities and feasibility of the boundary I recommended in the Final Report, I selected Survey A, with one small change, as best depicting the boundary recommended to this Court in my Final Report. I requested that New Jersey submit a final survey incorporating that change in what would be my Designated Survey. *Id.* at 41-47.

THE RECOMMENDED BOUNDARY

A. New Jersey's Surveys

Each of New Jersey's surveys filed on April 22, 1977 draws a boundary resembling the boundary depicted in Appendix K of the Final Report. There are slight variations between the two surveys and the Appendix K boundary, however, and, obviously, variations between the surveys themselves. I set out below a detailed description of these surveys for the Court's consideration.

1. Survey A

The boundary drawn in Survey A closely resembles the boundary depicted in Appendix K of my Final Report, with three principal differences. First, Survey A encompasses 5.1 acres rather than the 4.89 acres I suggested would ideally encompass New York's acreage. This additional 0.2 acres easily fits within the zone of flexibility I recommended. *See* Final Report at 166. Second, in the

Survey, the corridor connecting the Main Building to the Baggage & Dormitory Building ("the B & D Corridor") could not be divided in the manner described in the Final Report without intersecting a portion of either the Main Building or the Baggage & Dormitory Building. *See* Letter from New Jersey Assistant Attorney General Joseph Yannotti to Special Master Paul R. Verkuil at 1-2. Accordingly, Survey A seeks to preserve the intent of Appendix K—evenly dividing the area between the Main Building and the Baggage & Dormitory Building on either side of the B & D Corridor—by making more obtuse the angle formed at the intersection of the line dividing the area between the Main Building and Baggage & Dormitory Building and the line intersecting the B & D Corridor.

The other principal difference between Survey A and Appendix K is the distance between the boundary line and the back of the Railroad Ticket Office on the northeast side of the Main Building. Survey A makes this a margin of fifty feet, rather than the ten-foot margin described in Appendix K, in order to encompass the remains of Fort Gibson. This is a favorable departure from Appendix K because it affords New York a more gracious margin of sovereignty around the Main Building and preserves her jurisdiction over the original fort located on the Island.

The only other difference between Survey A and Appendix K occurs at the intersection of the boundary on the northeast side of the Main Building and the triangle-shaped area on the southeast side of Island Number One. In the Final Report, I suggested that this northeast boundary line intersect the point where the east side of the triangle-shaped area intersects the southeast side of Island Number One. Final Report at 165. In both Surveys A and B, however, the northeast boundary line intersects the east side of the triangle-shaped area at a point slightly south of the point of intersection I recommend in the Final Report.

This discrepancy is inconsequential. It appears that the boundary was drawn in this manner for two reasons. First, although I described the boundary in the Final Report as set out above, in Appendix K the red area depicting New York's sovereign territory in fact actually draws this portion of the boundary approximately as Surveys A and B depict it. This was an unintended but minor discrepancy between the boundary description in the Report and the graphic representation of the boundary in Appendix K. Second, Mr. Marchuk and his assistant explained during the walking tour of the Island that, had the boundary line been drawn as described in the Report, the line drawn from the intersection of the east side of the triangle-shaped area and the southeast side of Island Number One would intersect the boundary on the northeast side of the Main Building at a point further northwest than described in the Final Report.

2. Survey B

Survey B differs from Survey A in two respects. First, the boundary line on the northeast side of the Main Building (on either side of the B & D Corridor) is flush with the sides of the Main Building, rather than at a margin. Similarly, the boundary on the northwest side of the B & D Corridor is flush with the Corridor. Second, consistent with the boundary described above, the boundary running through the B & D Corridor intersects the sides of the Corridor at a ninety-degree angle. This line extends from the boundary on the small portion of the northeast side of the Main Building on the southeast side of the B & D Corridor, flush with the Main Building, through the Corridor, intersecting the line flush with the northwest side of the Corridor. The margin of fifty feet behind the Railroad Ticket Office is achieved by drawing a line flush with the small northwest portion of the Railroad Ticket Office and extending it to intersect at a ninety-degree angle a line drawn fifty feet behind the Railroad Ticket Office and parallel to the back of the Ticket Office. As noted

above, like Survey A, Survey B includes the small discrepancy with regard to the triangle-shaped area of Island Number One.

I have selected Survey A rather than Survey B for several reasons. First and most important, the boundary in Survey A does not hug the Main Building at any point. Second, Survey A successfully embodies all of the equitable goals set forth in my Final Report. Third, the State of New York and the Preservation Amici all prefer Survey A. Tr. 5/14/97 at 11-14.

B. The Designated Survey

The Designated Survey has been lodged with the Clerk of the Court. It describes in precise terms the boundary in the Final Report. It is essentially Survey A produced by New Jersey on April 22, 1997 (the original of which has also been lodged with the Clerk of the Court), with some minor variations.

Although Survey B encompasses exactly 4.89 acres of land, it does so by sacrificing some degree of practicality and convenience. The proposed boundary lines of Survey B that are flush with the Main Building create the inherent difficulty of undertaking an activity near the Building, such as repairs, without straddling state lines. *Id.* at 13, 42-43. Also, because there are decorative eaves around the top of the Main Building extending outward several feet, *id.* at 12-13, in Survey B a vertical line drawn from the top of the northeast side of the Main Building in the area northwest of the B & D Corridor, for example, would intersect the ground in New Jersey's territory. It is self-evident that such a boundary would be unfair to both States, causing unnecessary complications for state-controlled matters, such as application of workers' compensation laws.

The Designated Survey is superior to Survey A in one respect. It amends Survey A so that the boundary inter-

sects the B & D Corridor at right angles to the sides of the Corridor. *Id.* at 43-46. There are at least two advantages to this correction. First, there is a consistency with regard to the two physical structures intersected by the boundary, as both Corridors are intersected by a line drawn at right angles to the sides of the Corridors. Second, the amended boundary intersecting the B & D Corridor is more easily ascertained in the Corridor itself, as New York's territory ends at the threshold of the Baggage and Dormitory Building.

Finally, there remain two de minimus aspects of the boundary set out in the Designated Survey which warrant discussion. First, as alluded to above, the Designated Survey retains the discrepancy with regard to the description of the boundary near the triangle-shaped area of Island Number One. I am satisfied that the objectives sought by drawing the line in the manner described in the Report are equally well served by the boundary drawn in the Designated Survey. *Id.* at 46-47.

Second, Mr. Marchuk explained during the walking tour that the boundary line parallel to the northwest side of the Main Building divides the stairway to the corridor connecting the Main Building and the Boathouse Building in such a manner that approximately five inches of the southeast railing of the stairway is in New York territory. The entire stairway should be regarded as New Jersey territory, but without otherwise changing the location of the boundary line on the northwest side of the Main Building.

C. New York's Maps

New York produced four maps instead of the survey I requested. The maps do not comply with my request that this final phase should provide a precise survey of my recommended boundary. At the same time, these maps serve a useful purpose: they essentially repropose the template approach I considered but rejected for the rea-

sons addressed in my Final Report and above, *see supra* pp. 2-3. The maps add random areas of New York's territory to the area covered by the original Island (the template) in attempting to address the practical and equitable concerns I raised in my Final Report. The maps serve to illustrate all of the handicaps I found with the template approach and reinforce my conviction that the boundary described in the Final Report, with the small deviations reflected in the Designated Survey, is superior to any other proposed boundary in terms of convenience, practicality and fairness. I included these maps on the record. Tr. 5/14/97 at 40-41. They are at Docket Item No. 393.

CONCLUSION

The precise description of the boundary line separating the sovereign territory of the State of New Jersey and the State of New York on Ellis Island is set forth in the Designated Survey lodged with the Clerk of the Court. I propose that this Court issue the Decree set forth on pages 169 to 170 of my Final Report, inserting the following description of the boundary in Paragraph 3 following the sentence stating: "The boundary between the two States on Ellis Island lies along the line described as follows:"

This description incorporates precise distances, in feet, only where the boundary line or points of intersection cannot be otherwise easily and accurately described.

A. Southwest Boundary

New York's territory on Ellis Island is bounded on the southwest by a boundary line running from the south corner of Island Number One, on the seawall of the ferry slip, to a point on the seawall of the ferry slip intersected by a line parallel to the northwest side of the Main Building that bisects the corridor connecting the Main Building and the Kitchen and Laundry Building.

B. Northwest Boundary

New York's territory is bounded on the northwest by the boundary line bisecting the corridor connecting the Main Building and the Kitchen and Laundry Building. This boundary line is located 18.00 feet from the base of the northwest side of the Main Building. Although this boundary line divides the stairway to the corridor connecting the Main Building and the Kitchen and Laundry Building such that approximately five inches of the southeast railing of the stairway technically is on the New York side of the boundary line, the entire stairway is New Jersey territory. The boundary on the northwest side of the Main Building forms a right angle at its intersection with the first segment of the boundary line on the northeast side of the Main Building.

C. Northeast Boundary

New York's territory is bounded on the northeast by a boundary consisting of six segments.

The first segment runs parallel to and 18.00 feet from the base of the northeast side of the Main Building, for a distance of 40.00 feet from its point of intersection with the boundary line on the northwest side of the Main Building.

The second segment intersects the corner of (1) the northwest side of the corridor connecting the Main Building and the Baggage and Dormitory Building (the "B & D Corridor" or "Corridor") and (2) the southwest side of the Baggage and Dormitory Building.

The third segment runs through the Corridor at right angles to the sides of the Corridor, to a point 5.00 feet from the base of the northwest side of the Railroad Ticket Office.

The fourth segment extends 56.31 feet parallel with the northwest side of the Railroad Ticket Office.

The fifth segment runs parallel to the northeast side of the Railroad Ticket Office at a margin of 50.00 feet.

The sixth segment runs parallel to the south side of the triangle-shaped area on the southeast side of Island Number One, to a point on the east side of the triangle-shaped area 219.61 feet from the point where the south and east sides of the triangle-shaped area intersect. The point of intersection between the fifth and sixth segments is 75.58 feet from the intersection of the sixth segment and east side of the triangle-shaped area.

D. Southeast Boundary

New York's territory is bounded on the southeast by a boundary that runs from the point of intersection of the sixth segment of the northeast boundary and the east side of the triangle-shaped area, follows the contours of the triangle-shaped area, and intersects the southwest boundary at the south corner of Island Number One on the seawall of the ferry slip.

Respectfully submitted,

PAUL R. VERKUIL
Special Master

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In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF NEW JERSEY, PLAINTIFF

v.

STATE OF NEW YORK

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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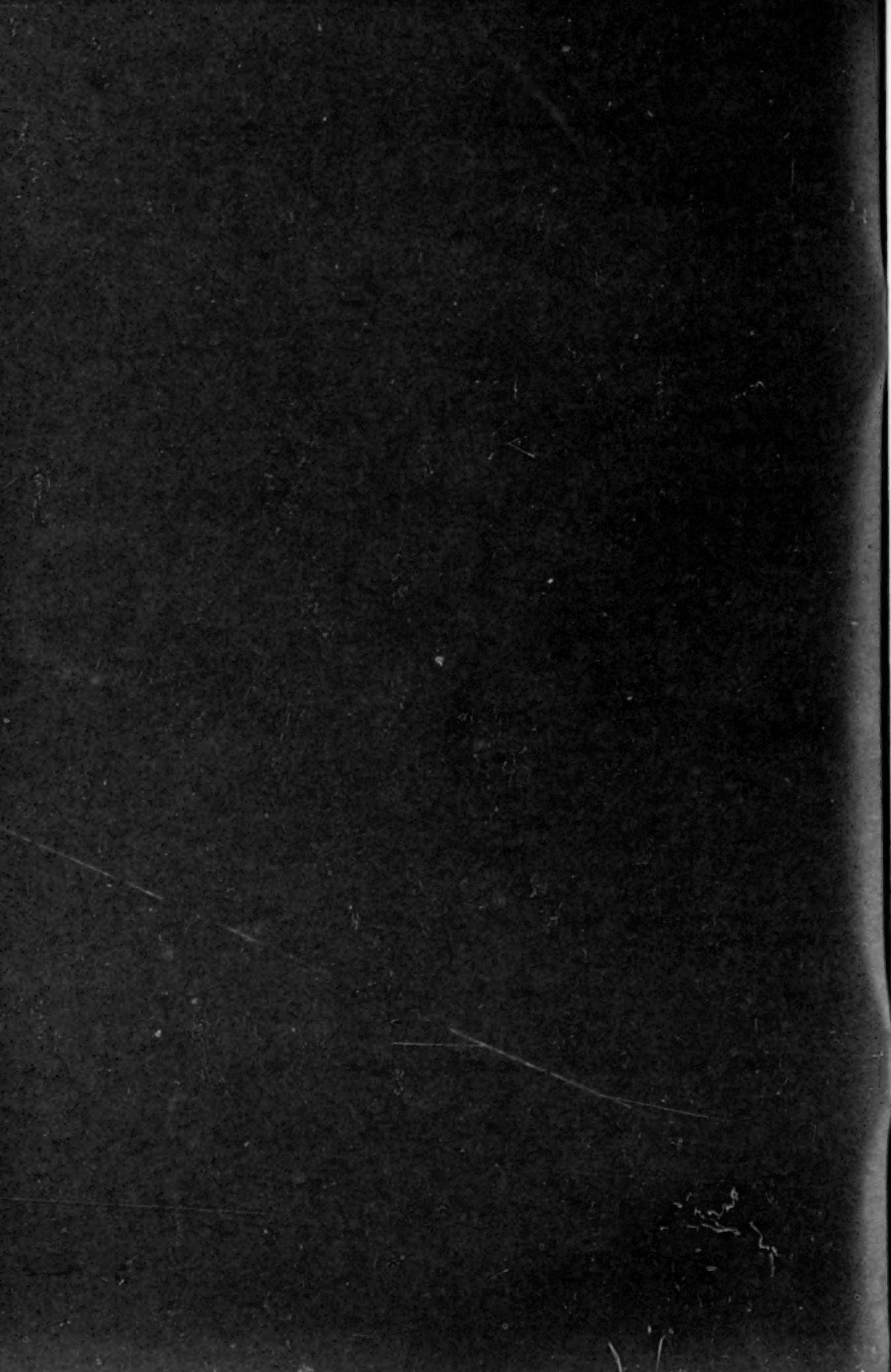


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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 120, Original

STATE OF NEW JERSEY, PLAINTIFF

v.

STATE OF NEW YORK

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

The State of New Jersey seeks leave to file an original action to resolve the allocation of political jurisdiction between it and the State of New York in relation to the artificially filled portions of Ellis Island. Ellis Island is located in Upper New York Bay, west of the line representing the middle of the Bay. The original island of approximately three acres was granted to the United States in 1808 by the State of New York for fortification purposes. Commencing after 1880, the island was used as a reception center for immigrants entering the United States at New York. In connection with that use, the United States filled approximately 24.5 acres of sur-

rounding water bottoms, and, as a result, the present island comprises 27.5 acres. The United States ceased using Ellis Island as an immigration station in 1954 and has since included it within the Statue of Liberty National Monument, which is administered by the National Park Service. The United States' title to the entire island is not in dispute. A map showing the original island and the filled portions is appended to *Collins v. Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992). *Id.* at 390.

1. Since the founding of the United States, the States of New York and New Jersey have disputed their political boundary in the area of New York Bay and the Hudson River. In the early 1800s, New York relied upon colonial documents to assert that the boundary lay at the low water mark on the New Jersey side along the entire length of the adjacent States. New Jersey asserted that the boundary lay at the midpoint of the water bodies. After several attempts to resolve those conflicting claims through negotiation, New Jersey filed an original action in this Court for a judicial resolution. See *New Jersey v. New York*, 28 U.S. (3 Pet.) 461 (1830). While that action was pending before this Court, state-appointed commissioners reached an agreement, embodied in a compact, that was ratified by both States and the United States Congress in 1834. Act of June 28, 1834, ch. 126, 4 Stat. 708. See *Collins*, 956 F.2d at 384-385.

Article First of the 1834 Compact provides:

The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and

New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

4 Stat. 709. It is not disputed that Ellis Island, including the filled land at issue here, is on the New Jersey side of the line described in Article First.

Articles Second and Third provide exceptions to the allocation of jurisdiction that would ordinarily be expected to follow from the drawing of the "boundary line" between the two States as provided in Article First. Article Second provides:

The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

4 Stat. 709. Article Third provides in pertinent part:

The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; * * * and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

4 Stat. 709-710.

This Court construed the 1834 Compact in *Central R.R. v. Jersey City*, 209 U.S. 473 (1908), a suit in which the City of Jersey City, New Jersey, sought to tax submerged land below the low-water mark on the New Jersey side of New York Bay. The Court held that the State of New Jersey has sovereignty over the submerged lands in New York Bay to the middle of the Bay, pursuant to Article First of the 1834 Compact, and that this sovereignty permitted New Jersey to levy taxes on the submerged land. The Court also suggested that Article Third's reference to New York's "exclusive" jurisdiction over the waters and submerged lands conferred "something less" than "sovereignty," but the Court did not elaborate on that point. See 209 U.S. at 479.¹

2. Pursuant to Article I, Section 8, Clause 17 of the United States Constitution, Congress has the power to exercise "exclusive Legislation" over "all Places purchased by the Consent of the Legislature of the State * * * for the Erection of Forts * * * and other needful Buildings." A State, however, may cede partial jurisdiction to the United States, retaining specific rights, such as the right to effect service of process. *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 539-542 (1885); *Paul v. United States*, 371 U.S. 245, 264-265 (1963). Both New

¹ The Court was not called upon to address the status of Ellis Island or the filled land surrounding the original Ellis Island. The Court, however, referred to Article Second in dictum, stating:

It is suggested that jurisdiction is used in a broader sense in the second article, and that may be true so far as concerns Bedlow's and Ellis Islands. But the provision there is that New York shall retain its "present" jurisdiction over them, and would seem on its face simply to be intended to preserve the *status quo ante*, whatever it may be.

Central R.R., 209 U.S. at 479.

York and New Jersey have ceded interests in Ellis Island to the United States.

In 1808, the State of New York conveyed to the United States “all the right, title and interest of” New York in Ellis Island, for the purposes mentioned in chapter 51 of the 1808 Laws of New York. See New York’s Br. in Opp. 3. Under that statute, the lands were granted “for the purpose of providing for the defence and safety of the city and port aforesaid,” and the ownership of those lands was to revert to the State in the event they were not “applied to [those] purposes.” 1808 N.Y. Laws ch. 51.

In 1880, New York enacted a statute ceding its “right and title” to and “jurisdiction over” specified submerged land surrounding various islands, including Ellis Island, “for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.” 1880 N.Y. Laws ch. 196. The cession of jurisdiction was to continue only as long as the United States owned the island, and New York reserved the right to serve process on the ceded land. *Ibid.*

In 1904, New Jersey conveyed to the United States “all the right, title, claim and interest of every kind, of the State of New Jersey” to specified land beneath the waters around Ellis Island. See New York’s Br. in Opp. 6-7. New York and New Jersey agree that the filled lands at issue in this case are located within the areas described in New Jersey’s 1904 conveyance. New Jersey’s Br. in Support of Mot. to File Compl. 9; New York’s Br. in Opp. 7.

3. On April 26, 1993, New Jersey filed with this Court a Motion for Leave to File Complaint, together with the complaint and a brief in support of the motion. The complaint and the brief describe the continuing disagreement between the States of New York and New Jersey

regarding jurisdiction over the filled land at Ellis Island. See Compl. 7-15; New Jersey's Br. in Support of Mot. to File Compl. 10-19. In particular, the complaint alleges:

(a) The filled land at Ellis Island has been carried on the tax roles of the City of Jersey City during the entire period that the land has been filled;

(b) In 1963, the City of Jersey City enacted a zoning ordinance that purported to apply to Ellis Island in the event that the island were sold to private interests;

(c) In 1986, the Governors of New York and New Jersey entered into a memorandum of agreement proposing that the two States equally divide state and local taxes collected on Ellis Island. Although New Jersey incorporated that agreement into its state law, N.J. Stat. Ann. §§ 32:32-1 *et seq.* (West 1990), New York has not taken similar action, despite New Jersey's requests that New York do so;

(d) New York includes Ellis Island within its County of Manhattan for the purposes of congressional and state legislative districts and for other purposes; and

(e) The Center Development Corporation may propose the renovation of three existing buildings on the filled portions of Ellis Island, and the financing of those renovations would be undertaken with the proceeds from bonds issued by the Dormitory Authority of the State of New York. As a related matter, New York City has taken steps to have the entire island declared a New York City Landmark.

Compl. 7-15; see also New Jersey's Supp. Br. in Support of Mot. for Leave to File Compl. 10-19. The complaint seeks declaratory and injunctive relief holding that the filled land and surrounding waters at Ellis Island are "within the territory and jurisdiction of the State of New Jersey." New Jersey does not contest that the original three acres of Ellis Island are within the jurisdiction of New York. See Compl. 15.²

² New Jersey's complaint also describes past conflicts as to jurisdiction over Ellis Island that do not present a current controversy between those States, including assertions that:

(a) In 1934 certain New Jersey labor unions claimed that New Jersey had jurisdiction over the filled land in conjunction with the construction of several buildings on that land;

(b) Between 1955 and 1962, a number of New Jersey political leaders made statements, including testimony before congressional committees, claiming that New Jersey had jurisdiction over the filled areas of Ellis Island;

(c) In 1984, a lawsuit was filed in a New Jersey state court against the States of New Jersey and New York, in which the argument was made that the filled land on Ellis Island was within the jurisdiction of New Jersey. That suit was dismissed on the premise that only this Court had jurisdiction to decide boundary issues between States;

(d) The United States Court of Appeals for the Second Circuit rendered a decision in *Collins v. Promark Products, Inc.*, 956 F.2d 383 (1992), holding that the New York compensation law would be applied to resolve a contribution claim against the United States for damages sustained on the filled areas of Ellis Island, relying on Article Second of the 1833 compact. The States of New Jersey and New York each participated as amicus curiae before the Second Circuit in that case. The United States argued, contrary to the position adopted by the Second Circuit, that New Jersey law governed the contribution issue because the filled areas were subject to the jurisdiction of New Jersey.

See Compl. 7-13.

DISCUSSION

This Court has original and exclusive jurisdiction over a suit between two States. 28 U.S.C. 1251(a); see U.S. Const. Art. III, § 2, Cl. 2 (vesting this Court with original jurisdiction in all cases “in which a State shall be Party”). The Court has ruled, however, that its original jurisdiction should be invoked “sparingly,” *Utah v. United States*, 394 U.S. 89, 95 (1969), so that the Court’s “increasing duties with the appellate docket will not suffer,” *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972). Among the factors the Court considers in granting or denying leave to file a complaint are the “seriousness and dignity of the claim” and the existence of another forum where the matter may be litigated. *Id.* at 93. See *Mississippi v. Louisiana*, 113 S. Ct. 549, 552-553 (1992); cf. *Louisiana v. Mississippi*, 488 U.S. 990 (1988) (opinion of Justice White, joined by Justices Stevens and Scalia, dissenting from the Court’s denial of leave to file a complaint to determine a river boundary between Louisiana and Mississippi, where no other court had jurisdiction over the suit).

1. The area of filled land at issue in this case—approximately 24.5 acres—is quite small. More importantly, all of the land at issue is owned by the United States and is part of the Statue of Liberty National Monument. As set out above, in 1880, the State of New York ceded to the United States all of its jurisdiction and title to specified submerged lands surrounding Ellis Island. In 1904, New Jersey likewise ceded “all the right, title, claim and interest of every kind, of the State of New Jersey” to specified land beneath the waters around Ellis Island. To the extent that the States of New York and New Jersey have ceded jurisdiction to the United States over the lands in question, the federal government’s jurisdiction is exclu-

sive. See *United States v. Mississippi Tax Comm'n*, 412 U.S. 363, 370-371 (1973); *Paul v. United States*, 371 U.S. 245, 264 (1963).

In any event, even if the United States has not acquired exclusive jurisdiction over the lands in question pursuant to Article I, Section 8, Clause 17 of the Constitution, the United States nonetheless owns all of the real property constituting Ellis Island. The Property Clause of the Constitution therefore gives the United States broad authority to manage and regulate the property. U.S. Const. Art. IV, § 3, Cl. 2. Under the Supremacy Clause (Art. VI, Cl. 2), inconsistent state laws or regulations are ineffective. See *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).³

2. a. Given the United States' ownership and use of Ellis Island, there currently is very little, if any, practical conflict between New York and New Jersey arising from activities on the island. For example, New Jersey alleges that the City of Jersey City has carried Ellis Island on its real estate tax rolls for many years, and has zoned the island. The effectiveness of either of those measures, however, depends on the United States' relinquishing its ownership of the land comprising the island—an occurrence that no one suggests is likely. Similarly, although some of the buildings on the island might in the future be developed in a manner that would give rise to taxable interests in or activities on the island, such development has not occurred, and the prospects for future development are uncertain.

³ Indeed, New Jersey acknowledges that the federal government's control over Ellis Island has been so extensive that neither New Jersey nor New York has had a substantial opportunity to exercise sovereign power over the island. See New Jersey's Reply Br. in Support of Mot. for Leave to File Compl. 5.

New Jersey states that the Center Development Corporation may propose the renovation of three existing buildings on the filled portions of Ellis Island, and that the financing of those renovations will be undertaken with the proceeds of bonds issued by the Dormitory Authority of the State of New York. Compl. 14-15. If that project should proceed, it is difficult to see how New Jersey would be harmed, because New Jersey does not own any of the property involved. In any event, whether that proposal will materialize is speculative at this time. On January 21, 1988, pursuant to 16 U.S.C. 470h-3 and 16 U.S.C. 20 *et seq.*, the Secretary of the Interior entered into an Agreement to Lease with the Center for Housing Partnerships (now the Center Development Corporation), under which the Secretary is negotiating a final lease of the south portions of Ellis Island to the Center Development Corporation for adaptive reuse. The Agreement to Lease requires the Center Development Corporation to submit to the Secretary a variety of information and plans, which the Secretary must approve as a condition to execution of a final lease. The Agreement to Lease has been amended and/or extended several times. It expires in July 1994, unless it is further extended by the Secretary or the Center Development Corporation submits in a timely manner information and plans of the Corporation's adaptive reuse proposal that are acceptable to the Secretary. If the Secretary and the Center Development Corporation come to agreement on a final lease under the Agreement to Lease, the final lease must be submitted to Congress for a 30-day period prior to implementation with appropriated funds. See Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1387.

b. New Jersey also alleges injury as a result of New York's failure to enact a statute dividing the taxes generated by activities on Ellis Island in accordance with the memorandum of agreement between the Governors of the two States. It is unclear, however, whether or to what extent actual tax payments are in dispute and whether any events generating sales or use taxes are occurring in the filled areas of the island. Indeed, the Department of the Interior has suggested to us that all events currently generating such taxes occur on the original three-acre portion of the island, over which New Jersey concedes that New York has jurisdiction. See page 7, *supra*. If, in fact, there are no active disputes as to taxation on the filled portions of the island, there would seem to be no present case or controversy.

Although a decision by this Court resolving all aspects of sovereignty over the filled land on the island would control the issue of whether New Jersey or New York may collect taxes on the island, the Court should, in our view, be reluctant to expend its resources to resolve the matter when the existence of a concrete dispute appears so uncertain. That reluctance is particularly justified here, because New Jersey has other mechanisms at its disposal to resolve whether any Ellis Island entity is subject to that State's tax laws.

For example, New Jersey could seek to collect a tax payment from an identifiable entity doing business on Ellis Island that the State believes is subject to its taxation power.⁴ Such action would either resolve the issue

⁴ The Buck Act (Act of July 30, 1947, ch. 389, § 105(a), 61 Stat. 644) states:

No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein,

or clarify the contours of the alleged dispute. If the business entity contested New Jersey's tax assessment, the matter would be litigated in the New Jersey state courts. If the New Jersey courts agreed with the United States Court of Appeals for the Second Circuit that the State of New York has sovereignty over all of Ellis Island—and further concluded that New Jersey has no taxing authority on the island as a result—then there would be little occasion for this Court to consider the matter further. See *Central R.R.*, 209 U.S. at 479. But if the New Jersey Supreme Court reached a conclusion that conflicted with the decision of the Second Circuit and the business entity filed a petition for a writ of certiorari, then this Court could determine whether the state court decision presented an issue warranting its review. Alternatively, the States could then invoke this Court's original jurisdiction to address the question, and this Court could determine whether that specific controversy warranted the Court's attention in an original action. In either event, the Court would be in a position to address a specific concrete dispute that has been illuminated by a fully developed record. See Sup. Ct. R. 10.1(a).

3. In sum, we see no present need for this Court to exercise its original jurisdiction to resolve any question of New Jersey's authority to tax Ellis Island entities. Nor, from the United States' perspective, are there any

having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

4 U.S.C. 105(a).

other circumstances with respect to its administration of Ellis Island that suggest a present need for the Court to exercise its original jurisdiction to resolve any competing claims of New York and New Jersey to assert whatever residuum of state authority might in the future remain over one subject matter or another on the filled portions of the island.

We note as well the possibility that not all issues concerning the application of state law or jurisdiction would necessarily be answered in the same way—that, *e.g.*, New Jersey might be held to have the power to tax some or all property or transactions, not exempt under federal law, while New York might be held to have a measure of “police power” jurisdiction over the filled portions of the island. Cf. *Central R.R.*, 209 U.S. at 479-480. That possibility would weigh against an attempt by this Court to resolve all such issues in a single original action, at least in the absence of a more concrete controversy respecting some aspect of state authority.

CONCLUSION

The Motion for Leave to File Complaint should be denied.

Respectfully submitted.

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In the
Supreme Court of the United States

October Term, 1993

STATE OF NEW JERSEY,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

**SECOND SUPPLEMENTAL BRIEF
IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT**

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LEGAL ARGUMENT

NEW JERSEY'S MOTION FOR LEAVE TO FILE A COMPLAINT SHOULD BE GRANTED BECAUSE, NOTWITHSTANDING THE SOLICITOR GENERAL'S ARGUMENTS TO THE CONTRARY, NEW JERSEY HAS RAISED A CLAIM OF SUFFICIENT SERIOUSNESS AND DIGNITY TO WARRANT EXERCISE OF THE COURT'S ORIGINAL JURISDICTION.

At the Court's invitation, the Solicitor General has filed a brief in which he takes the position that the Court should decline to resolve New Jersey's contested claim of sovereignty over the filled portions of Ellis Island. The Solicitor General frankly admits that within the last two years the United States argued before the Court of Appeals of the Second Circuit in Collins v. Promark Products, Inc., 956 F.2d 383 (2d Cir. 1992), that the filled portions of the island were subject to New Jersey's jurisdiction. Moreover, the Solicitor General's brief does not repudiate the United States' substantive legal position that it advanced in Collins in support of New Jersey's claim. Despite the United States' substantive agreement with New Jersey in Collins, the Solicitor General asserts that the Court should not exercise its original jurisdiction so that New Jersey can secure a definitive ruling on this important boundary issue. With all due respect to the Solicitor General, the arguments made on behalf of the federal government urging denial of New Jersey's motion for leave to file a complaint are both inconsistent with legal precedents of this Court and impractical.

The Solicitor General makes essentially three points that require a response. The Solicitor General seems to suggest that Ellis Island is rather too small an area to warrant this Court's attention. Brief of the United States, at p. 8. It is further maintained that federal jurisdiction over Ellis Island is "exclusive" and there is little practical importance in determining whether the filled portions of Ellis Island are in New Jersey or New York. Brief of the United States, at pp. 8-9. Finally, the Solicitor General suggests that New Jersey could resolve its claim by assessing taxes based on activities in the disputed territory and then litigate the issue in the New Jersey courts or, perhaps, in this Court at some later time. Brief of the United States, at p. 12.

First, the Solicitor General is wrong in suggesting that the filled portions of Ellis Island are too small to justify the exercise of the Court's original jurisdiction. There is no decision of this Court which even remotely indicates that the size of a disputed area is the key factor in determining whether the Court should allow the filing of a complaint by one state against another to resolve a controversy over a boundary. Even a small piece of the United States known as the Barnwell Islands warranted this Court's merits consideration. See Georgia v. South Carolina, 497 U.S. 376, 110 S. Ct. 2093, 11 L.Ed. 2d 309 (1990). There is little doubt that Ellis Island, however small it may be, is a place of singular importance to the history of the United States. It deserves no less attention in this Court than the Barnwell Islands.

In arguing that there is little practical importance to the resolution of this case, the Solicitor General argues that federal authority over Ellis Island is exclusive. It is said that New Jersey ceded its jurisdiction over the filled portions of Ellis Island in its 1904 deed transferring ownership of the State-owned underwater lands to the United States. This is simply not so. In that instrument, the

State granted "all the right, title, claim and interest of any kind of the State of New Jersey," in the tideland properties to the United States. This is the language of conveyance, not language completely ceding the governmental jurisdiction of a sovereign state.

Mere ownership and use for public purposes by the United States does not entirely withdraw the lands from the jurisdiction of New Jersey. Surplus Trading Co. v. Cook, 281 U.S. 647, 650, 50 S.Ct. 455, 456, 74 L.Ed.1091, 1094 (1930), James v. Dravo Contracting Co., 302 U.S. 134, 141, 58 S.Ct. 208, 212, 82 L.Ed. 155, 162 (1937). This includes the taxing and police powers. Silas Mason Co. v. Tax Commission, 302 U.S. 186, 197, 82 S.Ct. 233, 239, 82 L.Ed. 187, 196 (1937). In Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963), the Court stated that although Congress has the power under Article I, §8, cl. 17 of the Constitution to exercise "exclusive legislation" over federal enclaves, it does not obtain the benefits of the constitutional grant of authority unless the States cedes its legislative authority and political jurisdiction to the United States. New Jersey transferred only its ownership in the submerged lands that became part of Ellis Island in 1904. New Jersey never ceded full legislative authority and political jurisdiction over those lands to the federal government.

New Jersey did enact a general statute consenting to future acquisitions of land by the United States, N.J. Stat. Ann. 52:30-1, as well as a statute that did cede exclusive jurisdiction "in and over any land so acquired," N.J. Stat. Ann. 52:30-2. However, these statutes were not enacted by New Jersey until three years after the United States acquired the state-owned tidal area around the original three acre Ellis Island. See Laws of New Jersey 1907, c. 19, §1. Previously, New Jersey consented to the acquisition of land

and ceded its legislative and political authority to the federal government in separate pieces of legislation enacted from 1790 through 1938 for thirty eight individual parcels of land. None of these laws included the lands around the original three acre Ellis Island. Thus, the Solicitor General can point to no action by the Legislature of the State of New Jersey that represents a cession of sovereign authority over the filled portions of Ellis Island to the United States. There is none, and as a consequence, New Jersey retains its jurisdiction over the filled portions of Ellis Island on all matters where there is no conflicting federal legislation.*

The Solicitor General additionally maintains that, even if federal authority is not exclusive on Ellis Island, there is currently little practical conflict between New Jersey and New York arising from the activities on the island. Yet, in his brief the Solicitor General has revealed for the first time how far along its renovation plans for Ellis Island have progressed. In its proposed complaint, New Jersey had alleged that the Park Service was expected to present plans of the Center Development Corporation of New York to renovate three buildings on the filled portions of the island as dormitories. New York dismissed the plan as "purported," and noted that it was merely a "proposal." See New York's Brief, at p. 19.

* Justice Holmes recognized this distinction in his opinion for the Court in Central Railroad Co. v. Mayor, etc. of Jersey City, 209 U.S. 473, 28 S.Ct. 592, 52 L.Ed. 896 (1908), in which he discussed the 1834 Compact fixing the boundary between New York and New Jersey in the Hudson River, the very compact at issue in this case. Justice Holmes noted that the sale by New Jersey of its submerged land in the Hudson River, in that case to a railroad, does not in any way convey the state's sovereignty.

According to the Solicitor General, the Secretary of Interior has executed a lease with Center Development Corporation in 1988 for the so-called "adaptive reuse" of the south portions of Ellis Island, the entire filled area of the island. The federal government has extended this lease several times. Center Development Corporation is bound by the lease to submit plans and specifications to renovate the buildings by July 1994 unless that deadline is extended. Those plans will provide a basis for the execution of a "final lease." Brief for the United States, at p. 10.

In the face of these facts, the Solicitor General nonetheless maintains that the prospects for future development are "uncertain." Brief of the United States, at p. 9. There is nothing "uncertain" about the fact that the federal government has been dealing with a private developer for the development of the filled portions of Ellis Island for six years and that development of the island could very well be imminent. Clearly, this is not a "purported" plan for renovation, as New York asserted. Nor is this merely a "proposal." Ellis Island is plainly on the verge of substantial development. To deny New Jersey the opportunity to pursue its case for sovereignty over the filled portions of Ellis Island now is effectively to deny New Jersey the ability to have a substantial voice in the imminent development of the island. It will simply be too late in the day to resolve these important issues at a future time.

New Jersey need not, however, wait for the finalization of the plans for Ellis Island in order to have any concern about the development of the island. As a practical matter, it is extremely important to know now whether Ellis Island is part of New Jersey or a part of New York. In planning for the development of the island, Congress has declared in the National Historic Preservation Act that the plans must be submitted for public comment. 16 U.S.C. §470(f).

Certainly, the public comment of the government of the state in which the development is to take place will have a great deal of weight.

Indeed, the actions of officials of the City of New York confirm that this is so. As New Jersey has previously pointed out, the New York City Landmarks Commission, with the concurrence of the City's Council, has designated all of Ellis Island, including the filled land, as a New York City historic district. The Chair of the Commission frankly admitted that this action was taken so that the Commission would have "more influence" in planning for the island's future. The New York Times, November 17, 1993, p. B4, column 1. See also The New York Times, November 9, 1994, p. B1 (quoting a New York City Council member as stating that, "It brings us to the table in any discussions having to do with the Island.") Quite obviously, City of New York officials think that during this extremely important planning stage of the future of Ellis Island there is great practical importance in knowing whether the island is in New Jersey or New York. Regrettably, the Solicitor General does not share this understanding.

Wholly aside from the importance of state involvement in the planning for the future of Ellis Island, eventual implementation of these plans will unquestionably have great practical importance to New Jersey and to New York. Although the federal government does have a certain measure of authority over the island as owner, such authority does not entirely foreclose the application of state law to activities within that federal property. It is well established that so long as there is no interference with the jurisdiction of the federal government, the State's domain continues even within a federal enclave such as Ellis Island. Howard v. Commissioners of Louisville, 344 U.S. 624, 627, 73 S.Ct. 465, 467, 97 L.Ed. 617, 621 (1953).

Substantial construction activities on Ellis Island will necessarily result in tax obligations owed by private individuals and entities to the state that has sovereign jurisdiction over the island. Under New Jersey law, this would mean taxes due under a variety of state laws including the Corporation Business Tax Act, N.J. Stat. Ann. 54:10A-1 et seq., the Gross Income Tax Act, N.J. Stat. Ann. 54A:1-1 et seq., and the Sales and Use Tax Act, N.J. Stat. Ann. 54:32B-1 et seq. Indeed, as the Solicitor General points out in his brief, Congress has expressly declared in the Buck Act that no person shall be relieved of the obligation to pay sales and use taxes on the ground that the sales or use in question occurred in a federal area. 4 U.S.C. §105(a). In addition, employees of the federal government and all workers on land owned by the federal government must contribute to the unemployment fund of the state where the land is situated. Congress has provided that the state has "full jurisdiction" in this regard. 26 U.S.C. §3305(d).

New Jersey also has a vital interest in having its worker's compensation laws enforced in all areas within its jurisdiction. Where workers are injured on federal property, Congress has directed the courts considering the claim to apply the law of the state where the accident occurred. 28 U.S.C. §1346(b). The Court of Appeals for the Second Circuit has already erroneously determined that New York's worker's compensation law would apply in a claim brought by a worker arising from injuries sustained on the filled portions of Ellis Island. Collins v. Promark Products, Inc., *supra*. The anticipated construction and development activities will undoubtedly mean the employment of many workers. Like the Collins case, some of those actions will be brought in the United States District Court for the Southern District of New York. The lower courts will undoubtedly apply the Collins precedent. But, as New Jersey and the federal government both argued in

the Second Circuit, New Jersey law -- not New York law -- should apply to the disposition of those claims. Again, it should be emphasized that the Solicitor General has not repudiated the United States' substantive legal position on those points.

Finally, and most surprisingly, the Solicitor General suggests in his brief that New Jersey might endeavor to have the issue of its interest in the filled portions of the island litigated by assessing taxes on individuals or entities by reason of their activities on the parts of Ellis Island that New Jersey claims. The Solicitor General suggests that New Jersey litigate these issues in New Jersey's courts and seek review by the Court on certiorari in the event of an unfavorable decision. The Solicitor General also suggest that New Jersey consider an original action after it had assessed taxes and had the issue decided in the state courts.

These arguments do not square with the Court's recent decision in Mississippi v. Louisiana, 506 U.S. ___, 113 S.Ct. 549, 121 L.Ed. 2d 466 (1992), wherein the Court held that only this Court has jurisdiction to determine boundary disputes between two states. In fact, the procedure outlined by the Solicitor General is precisely the sort of approach explicitly rejected by the Court in Mississippi v. Louisiana. The suggested procedure would, moreover, run afoul of the need for judicial economy. It would thrust private taxpayers into the middle of a jurisdictional tug of war between two states and compel them to engage in what could be years of protracted, expensive litigation. These suggestions are not practical and, more importantly, conflict with this Court's original and exclusive jurisdiction. Simply put, this case is a boundary dispute and the Supreme Court and only the Supreme Court has exclusive jurisdiction to hear it and to determine it.

In summary, the Solicitor General has failed to present any persuasive reason whatsoever for the denial of New Jersey's application for leave to file a complaint under this Court's exclusive jurisdiction. New Jersey has, in fact, presented a case of sufficient seriousness and dignity to warrant exercise of the Court's original jurisdiction. There is no other forum in which these claims can be definitively resolved, and the time to resolve these questions is now.

CONCLUSION

For the reasons set forth herein, New Jersey should be granted leave to file its complaint against New York to resolve the present dispute over the boundary between the states on Ellis Island.

Respectfully submitted,

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JUL 15 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

ANSWER

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Dated: July 12, 1994

No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

ANSWER

The State of New York, defendant, by its counsel, for its answer to the complaint, says:

1. It admits the allegations of paragraph 1 insofar as plaintiff purports to bring this action pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. § 1251(a).

2. It admits the allegations of paragraph 2 insofar as Ellis Island was approximately three acres in size when the boundary between New York and New Jersey in the New York harbor area was established by compact in 1834, by which New York's jurisdiction over the full extent of the Island was preserved; the Island was subsequently augmented by artificial fill; the Island is currently approximately 27.5 acres in size; the whole of the Island lies within the territorial and sovereign jurisdiction of the State of New York. It denies the remainder of paragraph 2.

3. It admits the allegations of paragraph 3 that the opinion of the United States Court of Appeals for the Second Circuit in *Collins v Promark Products, Inc.*, 956 F2d 383 (2d Cir 1992) "reflects a determination that the whole of Ellis Island, including the lands artificially filled after 1834, is within the territory of New York and subject to its governmental jurisdiction" and the New York City Landmarks Preservation Commission held a hearing on November 10, 1992 on the question of whether the whole of Ellis Island should be declared a city landmark. It affirmatively states that the Landmarks Preservation Commission declared Ellis Island to be a New York City landmark on November 16, 1993. It denies the remainder of paragraph 3.

4. It denies having knowledge or information sufficient to form a belief as to the future actions of the National Park Service purported in paragraph 4. It respectfully refers the Court to the New York Public Authorities Law § 1675 *et seq.* for the true content of that statute. It denies the remainder of paragraph 4.

5. It admits the allegations of paragraph 5 insofar as New York, New Jersey, and the United States ratified a Compact

on the dates alleged. It respectfully refers the Court to the Compact for its true content. It denies the remainder of paragraph 5.

6. It denies the allegations of paragraph 6 and respectfully refers the Court to the entire Compact for its true content.

7. Paragraph 7 states legal conclusions to which no response is required. If a response is required it denies the allegations of paragraph 7 and respectfully refers the Court to the entire Compact for its true content.

8. It denies the allegations of paragraph 8.

9. It admits the allegations of paragraph 9, but denies the implication that the 1834 Compact in any way limited New York's jurisdiction over Ellis Island to the original dimensions of the Island.

10. It admits the allegations of paragraph 10 inasmuch as the United States Government purchased any and all title and interest held by New Jersey to certain submerged lands around Ellis Island; a deed conveying such title and interest was delivered by New Jersey to the United States on November 30, 1904; the *New York Times* published an article on July 19, 1904, addressing an application to enlarge Ellis Island. It denies knowledge or information sufficient to form a belief as to the accuracy of the facts reported in that article, or as to how the Island was "sometimes * * * referred to" by employees on the Island or the United States Government. It respectfully refers this Court to the text of the 1904 grant and the July 19, 1904, news article for the

true content of those respective documents. It denies the remainder of paragraph 10.

11. It denies the allegations of paragraph 11.

12. It denies the allegations of paragraph 12.

13. It denies each and every allegation of paragraph 13 and its subparagraphs, except as hereafter described:

13(a). It denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13(a).

13(b). It denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13(b).

13(c). It admits that the *New York Times* reported a letter from Dr. McLean to Director Downey in an article on July 21, 1955. It respectfully refers this Court to the text of the article for its true content. It denies knowledge or information sufficient to form a belief as to the accuracy of the facts reported in the article.

13(d). It admits that the *Congressional Record* dated July 30, 1955 reports remarks of New Jersey Congressman Thomas J. Tumulty, and the *Congressional Record* dated August 1, 1955 reports remarks of New York Congressman George Klein. It respectfully refers this Court to the text of the *Congressional Record* for the true content and context of those remarks. It admits that Pub L No 341, c 779, 69 Stat 632 was approved on August 11, 1955.

13(e). It admits that the *New York Times* reported a trip to Ellis Island by various New Jersey political officials in an article on January 5, 1956. It respectfully refers this Court to the text of that article for its true content. It denies knowledge or information sufficient to form a belief as to the accuracy of the facts reported in the article. It admits that the *Congressional Record* dated March 7, 1956, reports remarks of New York Congressman Irwin D. Davidson. It respectfully refers this Court to the text of the *Congressional Record* for the true content of those remarks. It denies knowledge or information sufficient to form a belief as to whether or for what purpose Jersey City Mayor Gangami travelled to Ellis Island in October 1962.

13(f). It admits that the *New York Times* reported a telegram communication between a New Jersey State Senator to New Jersey Senators and Congressmen in an article on January 3, 1958. It respectfully refers this Court to the text of that article for its true content. It denies knowledge or information sufficient to form a belief as to the accuracy of the facts reported in the article.

13(g). It admits that *The Newark News* reported a proposed meeting and exchange between New Jersey and New York state officials in an article on July 22, 1960. It respectfully refers this Court to the text of that article for its true content. It denies knowledge or information sufficient to form a belief as to the accuracy of the facts reported in the article.

13(h). It admits that hearings on the disposal of Ellis Island were held before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations in September and December 1962, and that Jer-

sey City Corporation Counsel Meyer Pesin and others testified at that hearing on December 6, 1962. It denies that “[m]uch of the discussion by those who testified concerned ‘the question of jurisdiction over the island between the States of New York and New Jersey’ ”. It respectfully refers this Court to the transcript of the hearings of the Subcommittee for the true content of those hearings. It denies the implication that such testimony before the Subcommittee constituted action or an assertion of sovereignty by the State of New Jersey.

13(i). It admits that Jersey City enacted a zoning ordinance purportedly directed at Ellis Island on September 5, 1963, and that a copy of that proposed ordinance was submitted prior to its enactment to the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations on September 4, 1963. It denies that the ordinance “would control any development on the island if it were sold to private interests”. It denies the implication that the ordinance constituted action or an assertion of sovereignty by the State of New Jersey.

13(j). It admits that a complaint was filed in *Guarini v State of New York*, 215 NJ Super 426, 521 A2d 1362 (Chan Div 1986), *affd*, 215 NJ Super 293, 521 A2d 1294 (App Div 1986), *certif den*, 107 NJ 77, 526 A2d 157 (1987), *cert den*, 484 US 817 (1987). It denies that the sovereignty and jurisdiction of the State of New York and the State of New Jersey over Ellis Island were properly at issue in that case. It admits that New Jersey, a defendant in that action, filed an answer dated January 9, 1985. It respectfully refers the Court to the text of that answer for its true content and context. It denies that the position of New Jersey during that litigation “was consistent with” New Jersey’s allegation in

paragraph 2 of the Complaint. It respectfully refers this Court to the text of the decisions in *Guarini* for the true contents of the courts' findings in that matter.

13(k). It admits that Governors Cuomo and Kean signed a Memorandum of Understanding on June 23, 1986. It respectfully refers the Court to the text of the Memorandum for its true content. It admits that the Memorandum was incorporated by New Jersey into its laws in 1987 and that the Memorandum has not been incorporated into the laws of New York. It denies that the Memorandum was "only a partial attempted resolution of this dispute".

13(l). It admits that New Jersey and New York appeared as *amici curiae* before the Second Circuit in the *Collins v Promark Products* matter. It respectfully refers this Court to the text of the decision of the Second Circuit for its true content.

14. It admits the allegations of paragraph 14 insofar as New York State has always included the full extent of Ellis Island in its jurisdiction and in the jurisdiction of Manhattan for purposes of United States Congressional districts, New York State Senate and Assembly districts, and for other purposes. It denies that such inclusion was in any manner improper.

15. It denies the allegations of paragraph 15.

16. It admits the allegations of paragraph 16 insofar as New Jersey Attorney General Del Tufo wrote to New York Attorney General Robert Abrams on January 8, 1993. It denies that the letter "reiterat[ed] New Jersey's jurisdictional and

sovereignty claims over Ellis Island". It admits that Attorney General Abrams responded by letter dated February 8, 1993. It respectfully refers the Court to the text of those letters for their true contents. It admits that no proposals relating to the 1986 Memorandum of Understanding have been submitted to the New York State Legislature since 1988. It denies knowledge or information sufficient to form a belief as to communications to the New Jersey Historic Preservation Office. It denies knowledge or information sufficient to form a belief as to what Center Development Corporation "anticipates". It admits that the New York City Landmarks Preservation Commission declared Ellis Island to be a New York City landmark on November 16, 1993. It respectfully asserts that the allegations relating to the current legal status and effect of the 1986 Memorandum of Understanding are legal conclusions, to which no responses are required.

AND AS FOR ITS DEFENSES AND
AFFIRMATIVE DEFENSES HEREIN, THE STATE OF
NEW YORK ALLEGES:

FIRST

17. The plaintiff has failed to state a claim upon which relief can be granted.

SECOND

18. Plaintiff has not alleged sufficient facts to state a case or controversy warranting this Court's exercise of original jurisdiction.

THIRD

19. In September, 1833, commissioners representing New York and New Jersey entered into a compact to define the territorial limits and jurisdictional powers of each State in New York harbor. The agreement was ratified by the New York and New Jersey legislatures, and was approved by the U.S. Congress on June 28, 1834. Laws of New York 1834, Ch. 8; Laws of New Jersey 1833-34, p. 118; 4 Stat. 728, Ch. 126 ("1834 Compact").

20. While the provisions of the 1834 Compact established the general boundary line between the two States as the middle of New York Bay (Article I), that boundary was modified by several exceptions, both general and specific. Under Article Two, New York was to "* * * retain its present jurisdiction of and over Bedlow's and Ellis' islands * * *"; under Article Three, New York was to have "exclusive jurisdiction" over all waters of the bay and of the lands covered by said waters subject to certain rights of New Jersey. The Compact did not limit New York's sovereignty over Ellis Island to a fixed geographic dimension.

21. Under the terms of the 1834 Compact, New York State retained sovereignty and jurisdiction over the entirety of Ellis Island to the extent permitted by the federal govern-

ment. including sovereignty and jurisdiction over such additions to the Island that might subsequently be added by fill.

FOURTH

22. The State of New York realleges and incorporates herein each and every allegation set forth in paragraphs 19-21 hereof, as if fully set forth herein.

23. Throughout the history of Ellis Island, the full extent of the Island has been included within the jurisdiction of New York City and New York State for a wide variety of legal and civic purposes, including both State and Federal electoral and judicial districting. The Island's residents, including residents occupying its fill portion, have voted in New York's elections, been subject to New York's laws, been counted as New York residents in State and Federal censuses, and been generally treated as citizens of this State.

24. This exercise of sovereignty and jurisdiction over a well-populated area in New York Harbor was considerable and unconcealed, endured across several centuries, and included the whole of the Island at all times.

25. At no time during this period did the State of New Jersey seek to assert a meaningful sovereign claim over any portion of Ellis Island, despite many opportunities to do so. Rather, that State acquiesced in the exercise of sovereignty and jurisdiction by the State of New York.

26. By principles of prescription and acquiescence in the time-honored exercise of sovereignty and jurisdiction over the Island by the State of New York, New York currently has jurisdiction and sovereign authority over Ellis Island in

its entirety, including those parts of the Island enlarged by fill after 1890.

WHEREFORE, this Court should enter judgement dismissing the complaint, or declaring that the full extent of Ellis Island lies within the legal jurisdiction of the State of New York, and granting such other and further relief as the Court may deem proper.

Dated: Albany, New York
July 12, 1994

Respectfully submitted,

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Assistant Attorneys General

Of Counsel

(21)

No. 120, Original

In the Supreme Court of the United States
October Term, 1994

STATE OF NEW JERSEY,

Plaintiff,

- v. -

STATE OF NEW YORK,

Defendant,

- and -

THE CITY OF NEW YORK, RUDOLPH W.
GIULIANI, as Mayor of the City of New
York, and the CITY COUNCIL OF THE CITY OF
NEW YORK,

Proposed Defendants-Intervenors.

**MOTION FOR LEAVE TO INTERVENE AS PARTY
DEFENDANTS BY THE CITY OF NEW YORK, ITS
MAYOR, AND ITS CITY COUNCIL; AFFIDAVIT
AND BRIEF IN SUPPORT OF MOTION FOR LEAVE;
AND PROPOSED ANSWER.**

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Of Counsel.

*Attorney of Record February 23, 1995

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THE CITY OF NEW YORK, RUDOLPH W.
GIULIANI, as Mayor of the City of New
York, and the CITY COUNCIL OF THE CITY OF
NEW YORK,

Proposed Defendants-Intervenors.

**MOTION FOR LEAVE TO INTERVENE
AS PARTY DEFENDANTS**

Pursuant to Rule 17 of the Rules
of the Supreme Court of the United
States, the City of New York, its Mayor,
Rudolph W. Giuliani, and its governing
legislative body, the City Council of the

City of New York, hereby respectfully request leave of the Court to intervene as party defendants in this border dispute between the State of New Jersey and the State of New York concerning Ellis Island, such intervention being proper for the reasons set forth in the brief submitted herewith.

Dated: New York, New York
February 23, 1995

PAUL A. CROTTY
Corporation Counsel of
the City of New York
Attorney for Proposed
Defendants-Intervenors

LEONARD KOERNER, *
STANLEY BUCHSBAUM,
KRISTIN M. HELMERS,
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* Attorney of Record

No. 120, Original

In the Supreme Court of the United States
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STATE OF NEW JERSEY,

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Defendant,

- and -

THE CITY OF NEW YORK, RUDOLPH W.
GIULIANI, as Mayor of the City of New
York, and the CITY COUNCIL OF THE CITY OF
NEW YORK,

Proposed Defendants-Intervenors.

**AFFIDAVIT IN SUPPORT OF MOTION
TO INTERVENE**

KRISTIN M. HELMERS, being duly
sworn, states as follows:

1. I am an Assistant Chief in the
Appeals Division of the office of PAUL A.
CROTTY, Corporation Counsel of the City

of New York, attorney for the proposed defendants-intervenors. I am admitted to practice law in the New York State Court of Appeals, the highest court of the State of New York; in the United States Court of Appeals for the Second Circuit; and in the United States District Court for the Southern District of New York.

2. This affidavit is submitted in support of the motion by the proposed intervenors seeking leave of the Court to appear as party defendants.

3. As set forth more fully in the brief submitted herewith, the City of New York, its Mayor, and its City Council (collectively referred to hereafter as "the City") seek intervenor status because Ellis Island, which is the focus of the instant border dispute between the States of New York and New Jersey, has

been under the civil jurisdiction of the City of New York since pre-Revolutionary times. Accordingly, the City has a unique and compelling interest in the subject matter of this controversy, including an interest in continuing its local taxing and regulatory powers over the territorial extent of the Island as it now exists. The City's interests are different from, although not adverse to, the sovereign interest of the State of New York in protecting its borders and securing the general welfare of its citizens.

4. Because one of the areas within the City's civil jurisdiction is involved, this office was aware, through contemporaneous news accounts, both of New Jersey's attempt to invoke the original jurisdiction of the Court and of

this Court's May 16, 1994 decision that it would hear the case. Soon thereafter it was decided that we should submit an amicus brief, and we began researching the legal issues.

5. At various times throughout the summer of 1994 I worked with Stanley Buchsbaum, former Chief of the Appeals Division and the attorney who handled the 1954 challenge to the City's imposition of its local sales tax on Liberty (then Bedloe's) Island, Hill v. Joseph, 205 Misc. 441, 129 N.Y.S.2d 348 (Sup. Ct., N.Y. Co.), in locating and analyzing the materials Mr. Buchsbaum had used in defending that case, since the history and legal status of Liberty Island and Ellis Island are closely interrelated. In addition, we began compiling and

analyzing other relevant legal and historical documents.

6. Also during the summer and early fall of 1994, prior to the appointment of a special master, Mr. Buchsbaum and I were in reasonably close contact with Assistant Attorney General John McConnell in Albany, who had been given major responsibility for New York State's defense of the case. From him, we obtained copies of the papers which had been submitted to this Court by the named parties, and we discussed various avenues of research with Mr. McConnell. During this period we were also in touch by telephone with this Court's Chief Deputy Clerk, Francis J. Lorson, discussing on several occasions at what point in the litigation it would be appropriate for us to file an amicus brief.

7. Contemporary news accounts again were the source of our knowledge that, on October 11, 1994, this Court had appointed the Hon. Paul Verkuil to act as special master on the case. We were not aware of how the litigation was progressing, however, until I received a call from Assistant Attorney General McConnell at some point between January 4 and January 6, 1995. Mr. McConnell explained that the matter was now being largely handled out of the Attorney General's New York City office, under the direction of Assistant Attorney General Judith Kramer.

8. I immediately attempted to contact Ms. Kramer, and we finally spoke for the first time by telephone on or about January 11, 1995. During the course of our conversation, Ms. Kramer

mentioned that the special master, at one of his first meetings with counsel, had asked whether anyone was aware of any potential requests for intervention. Since she had had no prior contact with this office, she replied that she did not.

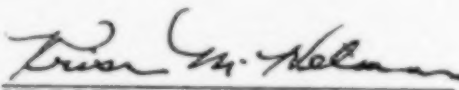
9. After my January 11, 1995 conversation with Ms. Kramer, I immediately contacted the special master to inquire whether an application for intervention by the City could be considered by the Court and, on his advice, I also spoke with Deputy Chief Clerk Lorson. Further legal research on the subject confirmed that there was precedent for permitting a municipality to intervene in a border dispute such as this even though one of the original parties was the parent state, i.e., Texas

v. Louisiana, 416 U.S. 965 (1974). Hence the instant motion, which is being submitted to the Court under date of February 23, 1995.

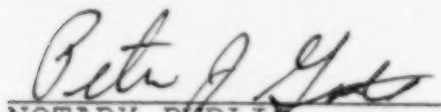
10. For a complete discussion of the intervention issue, the Court is respectfully referred to the City's brief, found at pages 13-69, infra. We note here only that the City's application meets all of the criteria for intervention at the District Court level set forth in Federal Rule 24(b), meaning that it would be a proper exercise of discretion for a District Court judge to permit intervention; that the prudential considerations which this Court has indicated should be weighed in cases involving its original jurisdiction present no obstacle to intervention; and that the City's unique perspective and

direct access to voluminous materials may
aid the Court in reaching a just
resolution of this controversy.

Dated: New York, New York
23 February 1995


KRISTIN M. HELMERS

Sworn to before me this
23 day of February, 1995.


NOTARY PUBLIC

PETER J. GATTO
Notary Public, State of New York
No. 01GA5037977
Qualified in New York county
Commission Expires Jan. 17, 1997

No. 120, Original

In the Supreme Court of the United States
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STATE OF NEW JERSEY,

Plaintiff,

- v. -

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THE CITY OF NEW YORK, RUDOLPH W.
GIULIANI, as Mayor of the City of New
York, and the CITY COUNCIL OF THE CITY OF
NEW YORK,

Proposed Defendants-Intervenors.

BRIEF IN SUPPORT OF MOTION TO INTERVENE

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QUESTION PRESENTED

Whether the Court should permit the City of New York, its Mayor, and its City Council to intervene as party defendants in this border dispute between the States of New York and New Jersey concerning Ellis Island, where (1) the proposed intervenors meet the requirements governing intervention set forth in Rule 24(b) of the Federal Rules of Civil Procedure; (2) the compelling interests which the City of New York wishes to protect are different from those asserted by the State of New York on behalf of its general citizenry, and principles of fairness suggest that the City should be permitted to defend those interests directly; (3) the City's intervention will not complicate the case by introducing new issues or by opening the

floodgates to similar applications by other municipalities; and (4) the interests of the original parties will not be prejudiced by permitting the City to participate in the litigation?

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THE CITY OF NEW YORK SHOULD BE PERMITTED TO INTERVENE AS A PARTY DEFENDANT BECAUSE IT MEETS THE REQUIREMENTS FOR PERMISSIVE INTERVENTION UNDER FRCP 24(b), THE STANDARD BY WHICH THIS COURT HAS TRADITIONALLY BEEN GUIDED IN GRANTING OR DENYING SUCH MOTIONS IN CASES INVOLVING ITS ORIGINAL JURISDICTION. 43

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2. The City's Application Not only Meets the Standards for Intervention Set forth in Federal Rule 24(b), but its Request to Intervene Presents None of the Problems Which Have Persuaded this Court, or the Lower Federal Courts, to Refuse to Permit Intervention in Other Cases.	51
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No. 120, Original

In the Supreme Court of the United States
October Term, 1994

STATE OF NEW JERSEY,

Plaintiff,

- v. -

STATE OF NEW YORK,

Defendant,

- and -

THE CITY OF NEW YORK, RUDOLPH W.
GIULIANI, as Mayor of the City of New
York, and the CITY COUNCIL OF THE CITY OF
NEW YORK,

Proposed Defendants-Intervenors.

BRIEF IN SUPPORT OF MOTION TO INTERVENE

PRELIMINARY STATEMENT

In this dispute in which the
plaintiff State of New Jersey is
attempting to assert sovereignty and
jurisdiction over approximately 24.5 of

the 27.5 acres which currently comprise Ellis Island, the City of New York, its Mayor, and its City Council (hereafter referred to collectively as "the City") seek leave to intervene on the grounds that (1) the City has a direct and compelling interest in the resolution of this controversy, since not only is it facing a threat to its civil jurisdiction, but the relief sought by New Jersey would impact on the City's economic base and interfere, inter alia, with its historic, cultural, aesthetic, and environmental interests in Ellis Island; (2) while these municipal interests are not adverse to those of the defendant State of New York, they are different from the interests of the general citizenry of the State as represented by the New York State

Attorney General; (3) the resources and perspective of the City will aid the Court in resolving this controversy justly; and (4) intervention, if permitted, will neither expand the controversy nor prejudice the current parties.

STATEMENT OF FACTS

(1)

New York City's Unique and Compelling Interests in This Litigation.

The historical record is clear that Ellis Island has long been considered within the physical boundaries and civil jurisdiction of the City of New York. The pre-Revolutionary Montgomerie Charter, for example, issued by the Governor of the Provinces of New York and New Jersey on January 15, 1730, confirms

that Ellis Island (variously identified in older documents as "Buckin's Island" or one of the three "Oyster Islands") was included within the boundaries of the City at that time, placing the Island within what was then known as the City's "South Ward." Jerrold Seymann, Colonial Charters, Patents and Grants to the Communities Comprising the City of New York (NYC Board of Statutory Consolidation, 1939), pp. 280-281.

This situation was unaffected (1) by the City's post-Revolutionary 1794 cession to the people of the State of New York, for the purpose of erecting fortifications for the defense of the City, of Governor's Island and Bedloe's Island (the current "Liberty Island"), as well as "the soil between High Water Mark and Low Water Mark adjacent to and around

the said Island commonly called Buckin's Island, Ellis Island or Oister Island" (Minutes for the Common Council of the City of New York, April 14 and April 21, 1794); and (2) by the State's acquisition of title by condemnation, and subsequent cession of the Island itself to the federal government, by Chapter 51 of the Laws of 1808 -- also for fortification purposes.¹ Shortly after the City's 1794 cession to the State, Chapter 29 of the Laws of 1803 increased the number of wards in New York City to nine but still described the "First Ward" as containing Ellis Island. After the 1808 conveyance by the State to the federal government,

¹ Both the City's conveyance to the State, and the State's conveyance to the federal government, contained express reverter provisions in the event that the Island ceased to be used for fortifications.

further increases in the number of wards within the City in 1817 and 1825 did not change the delineation of Ellis Island as part of the "First Ward." See, Ch. 285, L. 1817; Ch. 195, L. 1825.

Both prior to and following ratification of the 1834 Compact on which New Jersey rests its current claims, Ellis Island was described in the New York Revised Statutes as part of the County of New York, which was itself subsumed, as it is today, within the City of New York. Compare, Rev. Stat. of the State of N.Y. (1829), Ch. II, Title 1, § 2, par. 5 and Ch. II, Title 5, § 1, with Rev. Stat. of the State of N.Y. (1836), Chap. II, Title 1, § 5 and Title 5, § 1. Similarly, after New York State, in 1880, relinquished title and jurisdiction over the subaqueous lands

surrounding Ellis Island to the United States (with the reservation that the cession of jurisdiction would continue only as long as the United States owned the Island and the adjacent subaqueous lands), Ellis Island continued to be considered part of New York City. See, e.g., New York Consolidation Act of 1882 (L. 1882, Ch. 410, § 1); the Greater New York [City] Charter (L. 1897, Ch. 378; L. 1901, Ch. 466, § 1). That status continued despite New Jersey's 1904 transfer (without reservation) of title and jurisdiction over the subaqueous lands, even as the Island's size was increased by the filling operations undertaken by the federal government after 1890, and it remains in effect today. See, Administrative Code of the City of New York, § 2-202(1).

As an entity included within the City of New York, Ellis Island has been subject to the sales tax rules and regulations issued by the City (which imposes a local sales tax in addition to that levied by the State of New York) since the local tax was first implemented in 1938. First Annual Compilation of the Rules and Regulations of New York City Agencies (1938-1939) 52; 1 Cumulative Compilation of the Rules and Regulations of New York City Agencies 582 (1967). Cf. Hill v. Joseph, 205 Misc. 441, 129 N.Y.S.2d 348 (Sup. Ct., N.Y. Co., 1954) (holding that New York City was properly collecting sales tax on Bedloe's [now Liberty] Island). Any residents or businesses operating on the Island are also subject to the applicable local income and business tax regulations.

In addition, Ellis Island as an entity, no matter what the extent of its acreage, has been treated as part of New York City, for United States Census purposes, since at least 1910. See, e.g., Laidlaw, Population of the City of New York, 1890-1930, pp. 53, 85; U.S. Department of Commerce, Bureau of the Census, Housing (Supplement to the First Series Housing Bulletin for New York, 1940 Census); U.S. Dept. of Commerce, Bureau of the Census, Census Tract Statistics, New York, New York (1952); id. (1990). Certain monetary grants to the City from the federal government, as well as from the State of New York itself, are based on U.S. Census figures. Cf., Carey v. Klutznick, 637 F.2d 834, 836, 838 (2nd Cir. 1980) (City of New York, in addition to State of New York

acting as parens patriae, had standing to challenge the methodology of the 1980 Census because, inter alia, of injury to the municipality's interests as the direct recipient of federal funds), citing City of Camden v. Plotkin, 466 F.Supp. 44, 47-51 (D.N.J. 1978). Accord, City of New York v. U.S. Department of Commerce, 713 F.Supp. 48, 50 (E.D.N.Y. 1989) (same conclusion with respect to a challenge to the methodology of the 1990 Census).

Finally, New York City's interest in Ellis Island is not limited to the economic sphere. For example, on November 16, 1993, the Island was designated an "Historic District" pursuant to the New York City Landmarks Preservation Law. See, Charter of the City of New York, § 3020; Administrative

Code of the City of New York, Ch. 3, Title 25. The Historic District designation was premised on the fact that the buildings and other improvements on the Island "have a special character and special historical and aesthetic interest and value which represent one or more eras in the history of New York City...", and which thus cause this area "to constitute a distinct section of the City." Ellis Island Historic District Designation Report, "Findings and Designation," p. 71. More particularly, the Designation Report, while recognizing that the Island has become a "symbol of identity" for all citizens descended from voluntary immigrants, nevertheless points out that, "of the approximately twelve million immigrants to the United States [who] have passed through Ellis Island,

some half of that number were received by New York City[,] making it particularly significant for the city's history . . .
." Id.²

² New York City's Landmarks Preservation Law is widely recognized as one of the most effective in the area of historic preservation. See, Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). Any improvements within a New York City Historic District become subject, under the Landmarks Law, to a series of regulations governing future changes to the designated improvements. While Ellis Island is currently administered by the National Park Service ("NPS"), the Park Service, in accordance with established practice, consults with local governments concerning changes to properties designated for historic preservation purposes within the jurisdiction of those localities. In the case of Ellis Island, the NPS expressly stated that it had no objection to the Landmarks Preservation Commission's decision to designate the Island as an Historic District. Nor is it unusual for federally-controlled properties to become subject to the New York City Landmarks Preservation Law: the U.S. Customs House, the Statue of Liberty, Grant's Tomb, Hamilton Grange, and several federal courthouses and forts, as well as various buildings on
(continued...)

**Background to the
City's Motion to
Intervene.**

With respect to the current litigation, the Corporation Counsel of the City of New York, who represents the City and its interests in all litigation, became aware, through contemporaneous news accounts, of this Court's May 16, 1994 decision to resolve New Jersey's claim to all but approximately three acres of Ellis Island, as well as its appointment of the Honorable Paul R. Verkuil as special master on or about October 11, 1994. However, as set forth in the affidavit of Assistant Corporation Counsel Kristin M. Helmers, submitted

² (...continued)

Governors Island, have been given "Landmark" status under the City's statute.

herewith, the City originally believed that its participation in a dispute such as this would be limited to submission of an amicus curiae brief. We now believe, for the reasons set forth herein, that it is appropriate that the City be granted intervenor status so that it may undertake a more active defense of its interests and aid this Court directly in reaching a just resolution of the claims before it.

SUMMARY OF ARGUMENT

The City of New York's request for permission to intervene as a party defendant meets all the requirements which this Court has indicated are applicable in cases subject to its original jurisdiction.

First, to the extent that this Court looks to the Federal Rules for guidance,

the City has clearly satisfied the threshold requirements of Rule 24(b), which governs permissive intervention. The City's motion is timely, as "timeliness" has been interpreted by this Court and the lower federal courts. There are also questions of law and fact common to the main action and the City's defense -- including, inter alia, the question of whether, despite filling operations which enlarged the original size of Ellis Island after the States of New Jersey and New York entered into the Compact of 1834, and despite various cessions to the federal government on the part of both States, the entirety of the Island as it now exists remains within the civil jurisdiction of the City of New York.

Secondly, the prudential considerations which this Court, on several occasions, has indicated should enter into any evaluation of a motion to intervene, present no impediment to the granting of the City's motion. The compelling interests which the City of New York wishes to protect are not only unique to this particular municipal corporation, as distinct from other municipal corporations within the State, but different from the interests asserted by the State of New York on behalf of its general citizenry; accordingly, principles of fairness suggest that the City should be permitted to defend those interests directly. The City's intervention will certainly not complicate the case by either introducing new issues or by opening the floodgates to

similar applications by other private or governmental entities -- factors which this Court considered significant in cases such as Utah v. United States, 394 U.S. 89 (1969), and New Jersey v. New York, 345 U.S. 369 (1953). Nor will either of the original parties be prejudiced by permitting the City to become a formal part of this litigation at a point where discovery is still in its initial stages. Participation as an intervenor, on the other hand, can make the City's unique perspective and resources more directly available to the Court in reaching a just resolution than would be possible if the City's only role were that of an amicus curiae.

Finally, this Court's decision to permit intervention by the City of Port Arthur Texas, in Texas v. Louisiana, 416

U.S. 965 (1974), provides sound precedent for granting the instant motion by the City of New York. As in the case at bar, Texas v. Louisiana concerned a border dispute between two states in which a political subdivision of one of the original parties sought intervention to protect its particularized interest in an island property whose fate would be determined by the Court. This Court's earlier refusal to permit intervention by the City of Philadelphia in New Jersey v. New York, 345 U.S. 369 (1953), by contrast, has little bearing on the case at bar. Not only did New Jersey v. New York concern water rights rather than a border dispute, but it was clear that the City of Philadelphia's interest in obtaining its proper share of the waters of the Delaware was no different from

that of myriad other municipalities located on both shores of the river. Here, the City of New York, like the City of Port Arthur in Texas v. Louisiana, is asserting an interest unique to itself. Under such circumstances, intervention is appropriate.

ARGUMENT

THE CITY OF NEW YORK SHOULD BE PERMITTED TO INTERVENE AS A PARTY DEFENDANT BECAUSE IT MEETS THE REQUIREMENTS FOR PERMISSIVE INTERVENTION UNDER FRCP 24(b), THE STANDARD BY WHICH THIS COURT HAS TRADITIONALLY BEEN GUIDED IN GRANTING OR DENYING SUCH MOTIONS IN CASES INVOLVING ITS ORIGINAL JURISDICTION.

(1)

The Standard Governing Intervention in Cases of Original Jurisdiction.

In considering requests to intervene in cases involving this Court's exercise of original jurisdiction, the Federal Rules of Civil Procedure serve to guide the Court's exercise of its discretion, but are not binding. Arizona v. California, 460 U.S. 605, 614 (1983); Utah v. United States, 394 U.S. 89, 95 (1969); Stern, Gressman, Shapiro, and Geller, Supreme Court Practice (7th Ed.,

1993), p. 478. Federal Rule 24(a) governs intervention as of right, while the less stringent Rule 24(b) comes into play when a proposed party seeks permissive intervention.

The latter provision, by its own terms, states that intervention may be granted where the application is "timely" and the "applicant's claim or defense and the main action have a question of law or fact in common." FRCP 24(b). In other words, the Federal Rules permit "an appeal [to be] made to the Court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis." Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 506 (1941). Accord, Hodgson v. United Mine Workers of America, 473 F.2d

118, 130 (D.C. Cir. 1972) ("Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard").

In Arizona v. California, supra, 460 U.S. 605, this Court permitted certain Indian Tribes to intervene in a dispute between the two states concerning water rights in the Colorado River basin, despite the fact that the United States had already intervened in the litigation to protect the water rights on the reservations occupied by those same Tribes. 460 U.S. at 608, 612, 613. In so doing, the Court noted that the Indian Tribes had satisfied the standards for permissive intervention under Rule 24(b), observing more particularly that they

would necessarily be bound by any judgment. Accordingly, despite the fact that the United States formally represented their interests, the Court concluded that "the Indians' participation in litigation critical to their welfare should not be discouraged." Id. at 615.

In reaching its conclusion in Arizona v. California, the Court also indicated that it had weighed several other discretionary factors. It pointed out that intervention by the Tribes would not enlarge the Court's judicial power over the controversy, because the Tribes "do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States." Id. at

614. For the same reason, the Court could find no Eleventh Amendment problem. Id. The Court further commented that the two states opposing the motions to intervene had "failed to present any persuasive reason why their interests would be prejudiced or this litigation unduly delayed by the Tribes' presence," id. at 615, and it observed that the motions were "sufficiently timely with respect to this phase of the litigation." Id.

Three other decisions of this Court cast further light on the prudential concerns which go into weighing whether intervention in a case of original jurisdiction is appropriate. Intervention by a municipality to protect its property interests in an island claimed by the United States, as

intervenor, in a boundary dispute between two states was found proper in Texas v. Louisiana, 426 U.S. 465, 466 (1976), despite the fact that the municipality in question was a political subdivision of one of the state parties.

However, in New Jersey v. New York, 345 U.S. 369 (1953), a similar request for intervention by a municipality was not permitted in a three-state dispute over rights to the waters of the Delaware River. The Court reasoned, inter alia, that the City of Philadelphia's interests were adequately protected by Pennsylvania's participation in the litigation as parens patriae, and that to permit intervention by one of the many cities located along both banks of the Delaware might well lead to similar requests by other municipalities with

equally substantial interests. 345 U.S. at 372-373 (see detailed discussion in subpoint 2, below).

Proliferating requests for intervention were also of concern to the Court in Utah v. United States, 394 U.S. 89 (1969), where it held that "the interests of justice and sound judicial administration" would best be served by denying intervention to a large corporate landowner, Morton International, Inc., in a dispute between the two original parties over ownership of the Great Salt Lake. The lake had shrunk in size over the years and thus laid bare some 600,000 acres of land which had formerly been part of the lakebed. The Court observed that, had the original parties not limited the issues by entering into a stipulation, it would have seemed

"fairest" to permit the corporate landowner to speak for itself. Id. at 92. However, given the existence of the stipulation in question, the Court stated that "we can perceive no compelling reason requiring the presence of Morton in this lawsuit, [while] there are substantial reasons for denying intervention." Id. at 95. The latter included the fact that (1) if Morton were admitted, "fairness would require the admission of any of the other 120 private landowners who would wish to quiet their title to portions of the relicted lands;" and (2) intervention would expand the issues. The Court declined "to permit a private party to introduce new issues which have not been raised by the sovereigns directly concerned." Id. at 96.

(2)

The City's Application Not Only Meets the Standards for Intervention Set Forth in Federal Rule 24(b), But Its Request To Intervene Presents None of the Problems Which Have Persuaded This Court, Or The Lower Federal Courts, to Refuse To Permit Intervention in Other Cases.

From the cases discussed in subpoint (1), supra, the following principles may be distilled: Intervention is appropriately granted where (1) the applicant has a direct interest in the outcome of the litigation, there is a common question of law or fact, and fairness would seem to require its participation; (2) the intervention will not complicate the case by introducing new issues or by raising the prospect of voluminous applications by other persons similarly situated; (3) the interests of the original parties will not be

prejudiced by the presence of the proposed intervenor; and (4) the application is timely and will not delay the litigation. The instant application meets all these requirements.

- a. **Since the City Will Be Bound by the Final Result of this Litigation, It Should Be Permitted to Defend Its Own Interests Directly.**

Since there is no doubt that the City meets Rule 24(b)'s "common question of law or fact" threshold, the primary issue regarding its proposed intervention would appear to be whether its status as a political subdivision of the State of New York presents an impediment to direct participation in this lawsuit. As noted on pages 47-48, supra, this Court permitted just such municipal intervention in Texas v. Louisiana, which concerned a boundary dispute somewhat

similar to the one at issue here. The City of Port Arthur, Texas, was allowed to come in as an intervenor to protect its interest in an island claimed by one of the other parties, despite the fact that the State of Texas was the original plaintiff. 426 U.S. at 466.³

The result in Texas v. Louisiana is not at odds with the Court's previous refusal, in New Jersey v. New York, to

³ The published reports contain two references to Port Arthur's intervention, neither of which elaborates on the nature of the City's claim. See, 416 U.S. 965 (1974) (order granting intervenor status); 426 U.S. 465, 466 (1976) (passing reference to the fact that the City was permitted to intervene "for purposes of protecting its interests in the island claims of the United States"). The March 29, 1974 motion papers filed with this Court, however, indicate that Port Arthur was claiming that it had a fee-simple ownership interest in one of the islands in dispute, which it had received by deed from the State of Texas. Motion for Leave to Intervene in No. 36, Original (October Term, 1973), pp. 1, 19-20.

permit the City of Philadelphia to intervene in a dispute over water rights in which Pennsylvania was a party. In discussing the parens patriae doctrine as an obstacle to intervention by a municipality in a suit in which the parent state is already a party, the Court nevertheless envisioned circumstances in which municipal intervention might be appropriate -- i.e., where the municipality possesses "some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U.S. at 373.

The Court could find no such individualized municipal interest in New Jersey v. New York, where it specifically

observed that, in addition to Philadelphia's 2,071,605 citizens, roughly another 2,000,000 State residents were also dependent on the waters of the Delaware. 345 U.S. at 373, note*. In other words, the City of Philadelphia's interest in water rights to the Delaware was not unique; it was shared by numerous other municipalities along the river's banks, municipalities populated by an equal number of Pennsylvania residents, and the State of Pennsylvania was acting as parens patriae in seeking to vindicate rights common to all its citizens living in that geographic region. Indeed, in rejecting Philadelphia's application for intervention, the Court expressed the fear that, under such circumstances, it might ultimately find itself "drawn into an intramural dispute over the

distribution of water within the Commonwealth [of Pennsylvania],'" and that its original jurisdiction would be "expanded to the dimensions of ordinary class actions." Id. at 373. In Texas v. Louisiana, on the other hand, the City of Port Arthur was asserting an interest specific to itself as a municipal entity and not shared with all, or any portion of, the general citizenry of the State of Texas. That is precisely the situation here.

The lower federal courts have recognized the distinction between interests represented by the State as an entity and the more specific interests of its various political subdivisions. In Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994 (8th Cir. 1993), for example, a number of counties were

permitted to intervene in a dispute concerning an Indian group's rights, under a treaty with the State, to fish, hunt, and gather on lands within those counties. The Court observed that the counties were attempting to protect local and individual interests, such as loss of the value of their lands, which were narrower than, and not subsumed by, the State's general or sovereign interest in protecting natural resources or preserving naked title to certain territories. Id. at 1001.

In another treaty case, Scotts Valley Band of Pomo Indians v. United States, 921 F.2d 924 (9th Cir. 1990), the City of Chico was permitted to intervene, inter alia, because its interest in the removal of property from its civil jurisdiction, as well as its municipal

interest in its taxing and regulatory powers, were not directly shared by the defendant United States and its officials. Id. at 927. See also, State of New York v. Reilly, 143 F.R.D. 487 (N.D.N.Y. 1992) (affected towns and counties permitted to intervene despite presence of State as plaintiff); State of Illinois v. Butterfield, 396 F.Supp. 632 (N.D. Ill. 1975) (four local governments permitted to intervene on side of plaintiff State). Cf. Sierra Club v. U.S. Environmental Protection Agency, 995 F.2d 1478, 1484 (9th Cir. 1993) (a city has a significant interest in collecting property taxes and imposing land-use, health, and safety regulations); Rhode Island Cogeneration Associates v. City of East Providence, 728 F.Supp. 828 (D. Rhode Island 1990) (state permitted to

intervene in a suit against a municipality challenging a local ordinance because the interests of the two government entities in upholding the validity of the ordinance were different in scope).

In the case at bar, the City of New York has a number of compelling local interests which differ from the State of New York's more generalized interest in property historically considered under the State's control and jurisdiction. As discussed in the Statement of Facts, supra, these local interests range from the protection of the City's civil jurisdiction, with its attendant powers of taxation and regulation; to the economic implications for allocation of funds to the City by the State and federal governments flowing now, and in

the future, from having Ellis Island included within the City's boundaries for census purposes; to the aesthetic, historical and environmental concerns represented by the City's designation of the Island as an Historic District under its Landmarks Preservation Law. These interests are certainly not adverse to the interests of the general citizenry represented by the State as parens patriae, but, as in the case of the City of Port Arthur in Texas v. Louisiana, they are not coterminous.

The existence of differing, although not adverse, interests also bears on the second prong of New Jersey v. New York's parens patriae analysis. On the question of whether the State will "properly" represent the particularized interests of one of its political subdivisions, a

lower court has pointed out that the presumption of adequate representation does not arise when a locality's parochial interests are not necessarily shared by the general citizenry of the State. Mille Lac Band of Indians v. Minnesota, supra, 989 F.2d at 1001. Indeed, this would seem to be the import of this Court's decision in Texas v. Louisiana permitting intervention by the City of Port Arthur.

Other courts have emphasized, in various contexts, that the "tactical similarity of the legal contentions" of a current party with that of a proposed intervenor does not necessarily assure adequate representation, where, as here, the same goal is sought but the interests represented by the parties are different. Sierra Club v. Robertson, 960 F.2d 83, 86

(8th Cir., 1992) (State of Arkansas permitted to intervene as plaintiff in a challenge to federal forest management practices because the State's interests were broader than those of the plaintiff environmental association); Nuesse v. Camp, 385 F.2d 694, 703 (D.C.Cir. 1967) (intervention by a State official in a suit by a private bank proper for the same reason). But see, United States v. Hooker Chemicals, 749 F.2d 968 (2nd Cir. 1984); Environmental Defense Fund, Inc. v. Higginson, 631 F.2d 738 (D.C.Cir. 1979).

In sum, to the extent that there is any question about the propriety of permitting intervention by a municipality in a border dispute between States concerning territory within a city's civil jurisdiction, Texas v. Louisiana is

dispositive and the instant application should be granted. Given New York City's compelling interest in the instant litigation, an amicus curiae submission cannot adequately substitute for participation as a party. See, Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994); Nuesse v. Camp, supra, 385 F.2d at 704, n. 10. The City is also in a position to be able to contribute its resources and its access to specialized knowledge to aid the Court in resolving this litigation.⁴ See, State of Utah v. Kennecott Corp., 801 F. Supp. 553, 572 (D. Utah 1992), cert. denied __ U.S. __,

⁴ As a party, the City would be actively responsible for locating and assessing documentary records in the possession of its specialized agencies which might bear on this litigation, as well as for providing witnesses in the form of personnel qualified to authenticate or comment on those records.

115 S.Ct. 197 (1994). Under such circumstances, and given that none of the other factors bearing on the intervention issue require a contrary result (see subsections b and c, below), the City should be given the opportunity afforded by intervention to persuade the Court that New Jersey's position is without merit.

**b. Intervention by the City
Will Not Complicate the
Litigation.**

As in the case of the intervention by the Indian Tribes permitted in Arizona v. California, the City does not seek to introduce any new issues into this case, but only to participate in litigation critically affecting its municipal interests. Nor would intervention by the City raise the spectre of voluminous applications for intervention by other

entities which this Court found so troublesome in New Jersey v. New York, supra, 345 U.S. at 373, and Utah v. United States, supra, 394 U.S. at 95. New York City is the only municipality within this State which can assert interests sufficient to justify intervention.⁵

**c. Since This Application is
Timely, Intervention by
the City Will Not
Prejudice the Original
Parties.**

The prejudice to the original parties which this Court indicated in Arizona v. California, supra, 460 U.S. at 615, might weigh against permitting intervention is prejudice created by the

⁵ We cannot speak for the State of New Jersey, but a reading of the prior papers submitted to this Court suggests that the only such attempt to intervene might possibly be made by Jersey City.

proposed intervenor's delay in moving to be admitted as a formal party, not prejudice to existing parties if intervention is allowed. Ceres Gulf v. Cooper, 957 F.2d 1199, 1203 (5th Cir. 1992). The need of the original parties to respond to additional briefing does not constitute prejudice. See, Employee Staffing Services v. Aubry, 20 F.3d 1038, 1042 (9th Cir. 1994).

On the issue of the timeliness requirement in Federal Rule 24, this Court has indicated that timeliness is to be determined from all the circumstances, in the discretion of the Court. NAACP v. Branch, 413 U.S. 345, 366 (1973). Absolute measures of timeliness do not control, since the requirement is "not a tool of retribution to punish the tardy would-be intervenor, but rather a guard

against prejudicing the original parties by the failure to apply sooner." Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994). The point to which the suit has progressed is one factor to be considered, but it is not solely dispositive. NAACP v. New York, supra, 413 U.S. at 366. Similarly, the date on which a proposed intervenor became aware of the pendency of the action is not necessarily determinative. Sierra Club v. Espy, supra, 18 F.3d at 1206.

As described in the Affidavit of Kristin M. Helmers supplied herewith, the City of New York was aware, through contemporaneous news accounts, of the progress of the litigation from this Court's announcement of its decision to accept it as a case of original jurisdiction, through the Court's

appointment six months later of a special master. However, during this period, we were unaware that the Court's rules governing such controversies permitted intervention. It was not until mid-January 1995 that research revealed that a motion to intervene could be considered by the Court, and the instant application is being made under the date of February 23, 1995.

Under the circumstances, we submit that the timeliness requirement has been met. The City moved with dispatch once it determined that it was possible to protect its interests through intervention, and the litigation is still, as of this writing, in the early stages of discovery. Accordingly, there can be no prejudice to the original parties, whereas intervention, if granted, would

permit the City to contribute its resources and unique perspective to a just and equitable determination of the legal issues under consideration by the Court.

CONCLUSION

THE APPLICATION BY THE CITY OF
NEW YORK TO INTERVENE AS A
PARTY DEFENDANT SHOULD BE
GRANTED.

Respectfully submitted

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of the City of New York

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* Attorney of Record

No. 120, Original

In the Supreme Court of the United States
October Term, 1994

STATE OF NEW JERSEY,

Plaintiff,

- v. -

STATE OF NEW YORK,

Defendant,

- and -

THE CITY OF NEW YORK, RUDOLPH W.
GIULIANI, as Mayor of the City of New
York, and the CITY COUNCIL OF THE CITY OF
NEW YORK,

Proposed Defendants-Intervenors.

**ANSWER TO THE COMPLAINT OF THE STATE OF
NEW JERSEY BY THE PROPOSED DEFENDANTS-
INTERVENORS**

The City of New York, including
its Mayor and City Council, for its
Answer to the Complaint of the State of

New Jersey, states, through its counsel, as follows:

1. It admits the allegations of paragraph 1 insofar as plaintiff purports to bring this action pursuant to Article III, Section Two, Clause Two of the Constitution of the United States, 28 U.S.C. § 1251(a).

2. It admits the allegations of paragraph 2 insofar as Ellis Island was approximately three acres in size when the boundary between New York and New Jersey in the New York harbor area was established by compact in 1834, by which New York State's jurisdiction over the full extent of the Island was preserved; the Island was subsequently augmented by artificial fill; the Island is currently approximately 27.5 acres in size; the whole of the Island lies within the

territorial and sovereign jurisdiction of the State of New York. It affirmatively states that Ellis Island also has been, since at least 1730, and continues to be, subject to the local civil jurisdiction of the City of New York. It denies the remainder of paragraph 2.

3. It admits the allegations of paragraph 3 that the opinion of the United States Court of Appeals for the Second Circuit in Collins v. Promark Products, Inc., 956 F.2d 383 (2d Cir. 1992), "reflects a determination that the whole of Ellis Island, including the lands artificially filled after 1834, is within the territory of New York and subject to its governmental jurisdiction," and that the New York City Landmarks Preservation Commission held a hearing on November 10, 1993 on the

question of whether the whole of Ellis Island should be declared a City landmark. It affirmatively states that, on November 16, 1993, the Landmarks Preservation Commission designated Ellis Island a "Historic District" under Section 3020 of the New York City Charter and Chapter 3, Title 25 of the New York City Administrative Code. It denies the remainder of paragraph 3.

4. It denies having knowledge or information sufficient to form a belief as to the future actions of the National Park Service alleged in paragraph 4. It respectfully refers the Court to the New York Public Authorities Law § 1675 et seq. for the true content of that statute. It denies the remainder of paragraph 4.

5. It admits the allegations of paragraph 5 insofar as New York, New Jersey, and the United States ratified a Compact on the dates alleged. It respectfully refers the Court to the Compact for its true content. It denies the reminder of paragraph 5.

6. It denies the allegations of paragraph 6 and respectfully refers the Court to the entire Compact for its true content.

7. Paragraph 7 states legal conclusions to which no response is required. If a response is required, it denies the allegations of paragraph 7 and respectfully refers the Court to the entire Compact for its true content.

8. It denies the allegations of paragraph 8.

9. It admits the allegations of paragraph 9, but denies the implication that the 1834 Compact in any way limited New York State's jurisdiction over Ellis Island to the original dimensions of the Island.

10. It admits the allegations of paragraph 10 inasmuch as the United States Government purchased any and all title and interest held by New Jersey to certain submerged lands around Ellis island; a deed conveying such title and interest was delivered by New Jersey to the United States on November 30, 1904; the New York Times published an article on July 19, 1904, addressing an application to enlarge Ellis Island. It denies knowledge or information sufficient to form a belief as to the accuracy of the facts reported in that

article, or as to how the Island was "sometimes * * * referred to" by employees on the Island or the United States Government. It respectfully refers this Court to the text of the 1904 grant and the July 19, 1904, news article for the true content of those documents. It denies the remainder of paragraph 10.

11. It denies the allegations of paragraph 11.

12. It denies the allegations of paragraph 12.

13. It denies each and every allegation of paragraph 13 and its subparagraphs, except as hereafter described:

13(a). It denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13(a). It affirmatively states

that Ellis Island has been under the local civil jurisdiction of the City of New York since pre-Revolutionary times.

13(b). It denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13(b). It affirmatively states that Ellis Island has been under the local civil jurisdiction of the City of New York since pre-Revolutionary times.

13(c). It admits that the New York Times reported a letter from Dr. McLean to Director Downey in an article on July 21, 1955. It respectfully refers this Court to the text of the article for its true content. It denies knowledge or information sufficient to form a belief as to the accuracy of the facts reported in the article.

13(d). It admits that the Congressional Record dated July 30, 1955 reports remarks of New Jersey Congressman Thomas J. Tumulty, and the Congressional Record dated August 1, 1955 reports remarks of New York Congressman George Klein. It respectfully refers this Court to the text of the Congressional Record for the true content and context of those remarks. It admits that Pub. L. No 341, c. 779, 69 Stat. 632 was approved on August 11, 1955. it denies the implication that the remarks of Congressman Tumulty have any bearing on New York City's longstanding civil jurisdiction over Ellis Island.

13(e). It admits that the New York Times reported a trip to Ellis Island by various New Jersey political officials in an article on January 5,

1956. It respectfully refers this Court to the text of that article for its true content. It denies knowledge or information sufficient to form a belief as to the accuracy of the facts reported in the article. It admits that the Congressional Record dated March 7, 1956, reports remarks of New York Congressman Irwin D. Davidson. It respectfully refers this Court to the text of the Congressional Record for the true content of those remarks. It denies knowledge or information sufficient to form a belief as to whether or for what purpose Jersey City Mayor Gangami travelled to Ellis Island in October 1962.

13(f). It admits that the New York Times reported a telegram communication from a New Jersey State Senator to New Jersey Senators and

Congressmen in an article on January 3, 1958. It respectfully refers this Court to the text of that article for its true content. It denies knowledge or information sufficient to form a belief as to the accuracy of the facts reported in the article. It denies the implication that the telegram communication has any bearing on New York City's longstanding civil jurisdiction over Ellis Island.

13(g). It admits that The Newark News reported a proposed meeting and exchange between New Jersey and New York state officials in an article on July 22, 1960. It respectfully refers this Court to the text of that article for its true content. It denies knowledge or information sufficient to form a

belief as to the accuracy of the facts reported in the article.

13(h). It admits that hearings on the disposal of Ellis Island were held before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations in September and December 1962, and that Jersey City Corporation Counsel Meyer Pesin and others testified at that hearing on December 6, 1962. It denies that "[m]uch of the discussion by those who testified concerned 'the question of jurisdiction over the island between the States of New York and New Jersey'". It respectfully refers this Court to the transcript of the hearings of the Subcommittee for the true content of those hearings. It denies the implication that testimony before the

Subcommittee constituted action or an assertion of sovereignty by the State of New Jersey, or of civil jurisdiction over the Island by a municipality other than the City of New York.

13(i). It admits that Jersey City enacted a zoning ordinance purportedly directed at Ellis Island on September 5, 1963, and that a copy of that proposed ordinance was submitted prior to its enactment to the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations on September 4, 1964. It denies that the ordinance "would control any development on the island if it were sold to private interests". It denies the implication that the ordinance constituted action or an assertion of sovereignty by the State of New Jersey,

or of civil jurisdiction over the Island by a municipality other than the City of New York.

13(j). It admits that a complaint was filed in Guarini v. State of New York, 215 N.J. Super. 426, 521 A.2d 1362 (Chan. Div. 1986), aff'd, 215 N.J. Super. 293, 521 A.2d 1294 (App. Div. 1986), certif. den., 107 N.J. 77, 526 A.2d 157 (1987), cert. denied, 484 U.S. 817 (1987). It denies that the sovereignty and jurisdiction of the State of New York and the State of New Jersey over Ellis Island were properly at issue in that case. It admits that New Jersey, a defendant in that action, filed an answer dated January 9, 1985. It respectfully refers the Court to the text of that answer for its true content and context. It denies that the position of

New Jersey during that litigation "was consistent with" New Jersey's allegation in paragraph 2 of the Complaint. It respectfully refers this Court to the text of the decisions in Guarini for the true contents of the courts' findings in that matter.

13(k). It admits that Governors Cuomo and Kean signed a Memorandum of Understanding on June 23, 1986. It respectfully refers the Court to the text of the Memorandum for its true content. It admits that the Memorandum was incorporated by New Jersey into its laws in 1987 and that the Memorandum has not been incorporated into the laws of New York. It denies that the Memorandum was "only a partial attempted resolution of this dispute".

13(1). It admits that the states of New Jersey and New York appeared as amici curiae before the Second Circuit in the Collins v. Promark Products matter. It respectfully refers this Court to the text of the decision of the Second Circuit for its true content.

14. It admits the allegations of paragraph 14 insofar as New York State has always included the full extent of Ellis Island in its jurisdiction and in the jurisdiction of the County of Manhattan in the City of New York, for purposes of United States Congressional districts, New York State Senate and Assembly districts, and for other purposes. It denies that such inclusion was in any manner improper.

15. It denies the allegations of paragraph 15.

16. It denies knowledge or information sufficient to form a belief as to the existence and/or nature of any correspondence between the New York and New Jersey Attorneys General. It denies knowledge or information sufficient to form a belief as to the existence or nature of communications to the New Jersey Historic Preservation Office. It denies knowledge or information sufficient to form a belief as to what Center Development Corporation "anticipates". It admits that the New York City Landmarks Preservation Commission declared Ellis Island to be a New York City "Historic District" on November 16, 1993. It respectfully asserts that the allegations relating to the current legal status and effect of the 1986 Memorandum of Understanding are

legal conclusions, to which no responses are required.

**AND AS FOR ITS DEFENSES AND
AFFIRMATIVE DEFENSES HEREIN,
THE CITY OF NEW YORK ALLEGES:**

FIRST

17. The plaintiff has failed to state a claim upon which relief can be granted.

SECOND

18. The Montgomerie Charter of 1730 specifically placed Ellis Island under the civil jurisdiction of the City of New York, and that status, with its concomitant regulatory and taxing powers, has continued uninterrupted through the present.

THIRD

19. In September, 1833, commissioners representing the States of New York and New Jersey entered into a

compact to define the territorial limits and jurisdictional powers of each State in New York harbor. The agreement was ratified by the New York and New Jersey legislatures, and was approved by the U.S. Congress on June 28, 1834. Laws of New York 1834, Ch. 8; Laws of New Jersey 1833-34, p. 118; 4 Stat, 728, Ch. 126 ("1834 Compact").

20. While the provisions of the 1834 Compact established the general boundary line between the two States as the middle of New York Bay (Article I), that boundary was modified by several exceptions, both general and specific. Under Article Two, New York was to "* * * retain its present jurisdiction of and over Bedlow's and Ellis's Islands * * *"; under Article Three, New York was to have "exclusive jurisdiction" over all waters

of the bay and of the lands covered by said waters subject to certain rights of New Jersey. The Compact did not limit New York State's sovereignty over Ellis Island, or New York City's civil jurisdiction over the Island, to a fixed geographic dimension.

21. Under the terms of the 1834 Compact, New York State retained sovereignty and jurisdiction over the entirety of Ellis Island to the extent permitted by the federal government, including sovereignty and jurisdiction over such additions to the Island that might subsequently be added by fill. New York City similarly retained civil jurisdiction over the Island as an entity, including subsequent expansion of its acreage due to filling operations.

FOURTH

22. The City of New York realleges and incorporates herein each and every allegation set forth in paragraphs 19-21 hereof, as if fully set forth herein.

23. Throughout the history of Ellis Island, the full extent of the Island has been included within the civil jurisdiction of New York City and State for a wide variety of legal and civic purposes. The Island's residents, including residents occupying its full portion, have voted in New York City election districts, been subject to New York City regulation for taxation and other local purposes, and have been counted as New York City residents in State and Federal censuses.

24. This exercise of local civil jurisdiction over a well-populated area

in New York Harbor was considerable and unconcealed, endured across several centuries, and included the whole of the Island at all times.

25. At no time during this period did the State of New Jersey seek to assert a meaningful sovereign claim over any portion of Ellis Island, despite many opportunities to do so. Rather, that State acquiesced in the exercise of sovereignty and jurisdiction by the State of New York, and of local civil jurisdiction by the City of New York.

26. By principles of prescription and acquiescence in the time-honored exercise of sovereignty and jurisdiction over the Island by the State of New York, New York State currently has jurisdiction and sovereign authority over Ellis Island in its entirety, including those parts of

the Island enlarged by fill after 1890. The City of New York similarly exercises local civil jurisdiction over the Island in its entirety, including those portions of the Island enlarged by filling operations after 1890.

WHEREFORE, this Court should enter judgment dismissing the complaint, or declaring that the full extent of Ellis Island lies within the legal jurisdiction of the State and City of New York, and granting such other and further relief as the Court may deem proper.

Dated: New York, New York
February 23, 1995

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No. 120, Original

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**ON EXCEPTIONS TO THE REPORT OF THE
SPECIAL MASTER**

**EXCEPTIONS OF THE STATE OF NEW JERSEY
AND BRIEF FOR THE STATE OF NEW JERSEY
IN SUPPORT OF EXCEPTIONS**

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85 pp

No. 120, Original

In the

**Supreme Court of the United States
OCTOBER TERM, 1996**

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**ON EXCEPTIONS TO THE REPORT OF THE
SPECIAL MASTER**

EXCEPTIONS OF THE STATE OF NEW JERSEY

New Jersey agrees with the principal findings and conclusions of the Special Master and takes narrow exceptions to his Final Report as follows: 1) the Special Master erred in concluding that New York's jurisdiction on Ellis Island extends to the low water line of the Island as it existed in 1834, rather than the mean high water line; 2) the Special Master erred in his decision to refashion a boundary for reasons of practicality and convenience instead of adopting a boundary based on the United States Coast Survey of 1857; and 3) the Special Master erred in finding that the pier extending from Ellis Island in 1834 was supported by landfill and, therefore, was an area within New York's jurisdiction. These exceptions are consistent with the positions taken by New Jersey throughout this action.

Respectfully submitted.

PETER VERNIERO
Attorney General of New Jersey



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v.

STATE OF NEW YORK,
Defendant.

ON EXCEPTIONS TO THE REPORT OF THE
SPECIAL MASTER

BRIEF FOR THE STATE OF NEW JERSEY
IN SUPPORT OF EXCEPTIONS

JURISDICTION

The Court granted the motion of the State of New Jersey for leave to file a complaint on May 16, 1994. 511 U.S. 1080. The jurisdiction of this Court rests on Article III, Sec. 2, Clause 2 of the Constitution of the United States, and 28 U.S.C. §1251(a). *Mississippi v. Louisiana*, 506 U.S. 73 (1992).

STATUTES INVOLVED

Compact between New Jersey and New York. 4 Stat. 708 (1834); 1834 N.Y. Laws 8; 1833-34 N.J. Laws 118.

INTRODUCTION

In 1834, New Jersey and New York entered into a Compact to establish their territorial limits and jurisdiction. Ellis Island was then about 2 3/4 acres on the New Jersey side of the boundary established at the middle of New York Bay. The federal government owned the Island, having acquired title and jurisdiction over the property, to its mean high water line, from New York by 1808. Under the 1834 Compact, New York retained its then "present jurisdiction" on Ellis Island. New York was also permitted to exercise jurisdiction over the waters on the New Jersey side of the boundary in New York Harbor. The Compact further provided that New Jersey "shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York" and other waters between the States.

In 1890, the United States government selected Ellis Island as the site for the immigration station in New York Harbor. Additional space was needed for the immigration facilities and the federal government began to fill the submerged lands around the original Island. New Jersey objected to the filling of its lands and in 1904, the federal government secured a deed from New Jersey to land under water below the mean high water line of the original Island. At the time, the Attorney General of the United States, William H. Moody, wrote that there was no question as to New York's ownership and jurisdiction over Ellis Island "proper" and its ability to transfer the same to the United States, but under the 1834 Compact, ownership of the surrounding submerged lands was in New Jersey.

This Court, in *Central R.R. Co. v. Mayor of Jersey City*, 209 U.S. 473 (1908), held that the boundary between the States at the middle of the waters between New Jersey and New York was a division of territorial sovereignty. For a unanimous Court, Justice Holmes wrote that although the Compact permitted New York to exercise limited police

power jurisdiction in New Jersey waters, New Jersey remained sovereign over the lands under its waters. Justice Holmes further stated that the right of property in the Compact "is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits" 209 U.S. at 478.

The filling of New Jersey lands was accomplished in stages. The original Island was first enlarged. Then, two additional and separate islands were created and joined by bridges or gangways over open water. By 1934, the three islands had been joined by fill. Some 24 acres of filled land were made around the original 2 3/4 acres. Under the Compact of 1834, the filling occurred on New Jersey territory, on land subject to New Jersey's "ultimate sovereign rights." *Id.*

New Jersey brought this original action to resolve its dispute with New York regarding their boundary on Ellis Island. New Jersey claims that New York's "present jurisdiction" on Ellis Island is limited to the Island that existed in 1834 and does not extend to the portions of the Island subsequently created by filling lands under water. In his comprehensive Final Report, the Special Master agreed that under the Compact New Jersey remains sovereign over the disputed territory and that the decisions of this Court preclude New York from extending its territorial jurisdiction over the filled lands because the filling was an avulsive change. Moreover, the Special Master found that New York failed to carry its burden of establishing sovereignty over the filled portions of the Island by prescription and acquiescence.

The Special Master recommended that the Court draw the boundary on Ellis Island by apportioning some 5.1 acres to New York and the remaining 22.4 acres to New Jersey. This division of acreage is based on the Master's finding that New York's jurisdiction under the Compact on the original Island extends to low water, as depicted on the United States Coast

Survey of 1857. However, the Special Master recommends that the boundary not follow the line of low water on that Survey. Instead, based on what he perceived to be reasons of practicality and convenience, the Special Master suggests that the Court create an entirely new boundary line for the States.

New Jersey respectfully submits that the Court should adhere to the Special Master's considered resolution of the principal issue in this case: New York's jurisdiction on Ellis Island is confined to the Island as it existed at the time the Compact was made. However, New Jersey takes limited exception to the Special Master's Report. New Jersey excepts to the Special Master's conclusion that New York's jurisdiction under the Compact extends to the low water line. New York's jurisdiction should not encompass any land below the mean high water line as depicted on the 1857 United States Coast Survey and should not include the area represented by a pier which was on the south side of the Island in 1834 since there was no credible evidence that the pier was built on fill. Thus, New York's territory should encompass only 2.74 acres, not the 5.1 acres suggested by the Special Master. Further, New Jersey maintains that the Court should not completely refashion the boundary line in the manner suggested by the Special Master but should instead determine the boundary based on the mean high water line, as depicted on the 1857 United States Coast Survey.¹

A. Procedural history

New Jersey commenced this original action on April 23, 1993, by filing a motion for leave to file a complaint against New York. On May 16, 1994, the Court granted New Jersey leave to proceed. 511 U.S. 1080. New York filed its answer on July 15, 1994. On October 11, 1994, the Court referred

¹ The designation "P" as used in this Brief refers to New Jersey's trial exhibits, the designation "D" refers to New York's trial exhibits, and "Appendix" refers to the Appendix to this Brief.

the matter to Paul R. Verkuil, who was designated as Special Master. 513 U.S. 924.

The City of New York moved to intervene, and the Court denied that request. 115 S. Ct. 1996 (1995). Subsequently, on April 28, 1995 and November 21, 1995, the Special Master granted motions by New York City and Jersey City, New Jersey to participate as active *amici*. In addition, on October 19, 1995, the Special Master granted Hudson County, New Jersey's motion to file a brief as *amicus curiae*.

On March 5, 1996, New Jersey and New York filed motions for summary judgment. The National Trust for Historic Preservation, New York Landmarks Conservancy, Municipal Art Society of New York, Preservation League of New York State and Historic Districts Council ("Preservation *Amici*") moved on March 26, 1996 to file an *amicus* brief. The Special Master granted the motion on April 11, 1996. The Special Master heard argument on the summary judgment motions on April 11, 1996 and, for reasons set forth in an Interim Opinion, denied both motions on May 9, 1996.

The States filed pre-trial motions by June 10, 1996. On June 21, 1996, the Special Master issued an Opinion and Order which addressed these motions. In addition, prior to trial, New York requested permission to amend the pleadings to add the affirmative defense of laches. The Special Master denied the motion but subsequently allowed New York to present evidence pertaining to New York's claim at trial.

A lengthy trial was conducted before the Special Master from July 10, 1996 to August 15, 1996 at the Court and on Ellis Island. The trial yielded a transcript of over 4,000 pages. During the trial, the Special Master heard the testimony of numerous witnesses, including ten expert witnesses. In addition, the Special Master received into evidence nearly 2,000 documents.

The Special Master issued his Final Report on March 31, 1997, in which he concluded that New Jersey is sovereign over the landfilled portions of Ellis Island created by the federal government below the Island's low water line as of 1834. The Special Master directed the States to conduct surveys on Ellis Island to precisely delineate his recommended boundary. On April 22, 1997, New Jersey filed two alternative surveys (Surveys A and B); New York chose not to prepare a survey. Supp. Report at 6. The Special Master convened a conference on Ellis Island on May 14, 1997 to consider the surveys. The Special Master chose New Jersey Survey A, but directed that it be modified. Supp. Report at 7-10. On May 30, 1997, the Special Master issued a Supplement to his Final Report, which contains a precise description of the recommended boundary. Survey A, as modified, has been filed with the Clerk of the Court. Supp. Report at 10-18. The Special Master's Final Report and Supplemental Report were filed with this Court on June 16, 1997. 65 U.S.L.W. 3825.

B. Overview of the Special Master's report and recommendations.

1. Interpretation of the Compact of 1834.

The Special Master addressed the purpose of the Compact of 1834 and the relationship between Articles I, II and III. Article I establishes the boundary between the States at the middle of the Hudson River, of the Bay of New York, and other specified waters. Article II provides that New York "shall retain its present jurisdiction of and over Bedlow's and Ellis's islands" Under Article III, New York "shall have and enjoy" exclusive jurisdiction over certain waters, including the waters of the Hudson River and Bay of New York, "and of and over the lands covered by the said waters to the low water-mark on the . . . New Jersey side thereof" Report at 4a.

New Jersey argued that the main purpose of the Compact was to set a permanent boundary between the States and that this boundary was established in Article I. New Jersey also argued that Article III did not alter the boundary set in Article I, but conferred on New York limited, extra-territorial police power jurisdiction within New Jersey's sovereign territory. In support of its position, New Jersey relied on this Court's interpretation of Articles I and III adopted in *Central R.R. Co., supra*, wherein the Court squarely held in an opinion by Justice Holmes that the Article I boundary was the line of sovereignty between the States.

New Jersey asserted that Article II, which provides that New York shall "retain its present jurisdiction" over Ellis Island, pertained only to Ellis Island as it existed when the Compact was adopted in 1834. Thus, New Jersey argued that since Ellis Island was located entirely within New Jersey's Article I boundary, the landfilled portions of the Island created by the United States after 1834 were under New Jersey's sovereignty and jurisdiction. New Jersey maintained, therefore, that its boundary with New York on the Island is at the mean high water line of Ellis Island as it existed in 1834. Report at 19-20, 49-50.

New York argued that the boundary established in Article I was not a sovereign boundary but instead was a line that separated New Jersey's property from New York's property. New York insisted that it had sovereignty to the low water line of the New Jersey shore, subject only to New Jersey's right of property. In this respect, New York maintained that Justice Holmes was "wrong" when he found in *Central R.R. Co. v. Mayor of Jersey City* that under the Compact, boundary meant sovereignty. Report at 22. New York thus asserted that its sovereign territory under Article I encompassed Ellis Island. New York further argued that under Article II, New York was sovereign over Ellis Island, regardless of its size.

The Special Master conducted a thorough analysis of the Compact, the negotiations pre-dating the Compact, the States' activities post-dating the Compact, and legal precedent interpreting the Compact. He then adopted New Jersey's position, which comported with the interpretation of Articles I and III reached by this Court in *Central R.R. Co.*, *supra*.² The Special Master concluded that the Compact establishes a sovereign boundary in Article I, that Article III confers limited, extra-territorial jurisdiction on New York, and that the boundary set in Article I was not altered by Article III. Thus, he determined that after adoption of the Compact, the underwater lands surrounding Ellis Island which subsequently were filled by the United States remained under New Jersey sovereignty. Moreover, although jurisdiction is an attribute of sovereignty, a state may exercise jurisdiction outside of its territory. In Articles III and V of the Compact, the States agreed that each would exercise such extra-territorial jurisdiction. Thus, as the Special Master concluded, the exclusive jurisdiction conferred upon New York in Article III was not to be equated with sovereignty, but was limited police power jurisdiction over the waters of New York Harbor.

The Special Master concluded that under New York's interpretation of Articles I and III, the boundary line set in Article I would be rendered meaningless by Articles III and V, and the provisions of Articles III and V giving each State the "exclusive right of property" would become superfluous. He reasoned that such a result would contravene the well established principle that all terms of an interstate Compact,

² As Justice Holmes pointed out in *Central R.R. Co.*, the Court's interpretation of the Compact was based on prior rulings of the highest courts in New Jersey and New York. See *Central R.R. Co. v. Mayor of Jersey City*, 61 A. 1118 (N.J. 1905); *People v. Central R.R. Co.*, 42 N.Y. 283, *appeal dismissed*, 79 U.S. (12 Wall.) 455 (1870). Justice Holmes commented, "it would be a strange result if this Court should be driven to a different conclusion from that reached by both parties concerned." *Central R.R. Co.*, *supra*, 208 U.S. at 479.

or statute, should be given effect, and that Compact provisions should be harmonized to avoid rendering any provision inoperative. Report at 55-56.

In addition, the Special Master rejected New York's theory that New Jersey's boundary was contingent on the exercise of wharfing out rights, reasoning that such an interpretation "would create a jagged and indeterminate boundary line that would shift as New Jersey added to or removed her wharves or created new ones." Report at 63. The Special Master characterized New York's Compact reading as "convoluted" and concluded that if the drafters had intended to delineate five separate boundaries, as New York argued, "surely the Compact would have described this explicitly." Report at 67.³

The Special Master also conducted a thorough analysis of Article II, and determined that this Article settled the question of which State was sovereign over the Island in 1834, but did not resolve the question of sovereignty over the landfilled portions of the Island added after 1834. Also, while Article III gave both New York and New Jersey jurisdiction within the same territorial area, Article II did not. The Special Master concluded on this basis that the jurisdiction conferred on New York in Article II was the equivalent of sovereignty. Report at 60-63.

The Special Master's interpretation of Article II did not precisely comport with the positions of either New York or

³ In review of a New York exhibit entitled "The Five (5) Meanings of Boundary," Report at 10a, the Special Master remarked that "New York's creative interpretation [of the Compact] stretches beyond its breaking point the apparent intent of the drafters." Report at 60. The Special Master rejected New York's theory of a "shifting interstate boundary" under Article III, whereby New York argued "New Jersey could, if the Federal Government didn't object . . . wharf out to Mars" Report at 63-67; and T4107-5 to T4108-2.

New Jersey. New York argued that Article II gave it sovereignty over an "Ellis Island" of unlimited size, because the Article did not contain any size limitation.⁴ New Jersey argued that Article II limited New York's jurisdiction to Ellis Island as it existed in 1834, because the Article provided that New York would retain its "present" jurisdiction and included other present-tense language. The Special Master concluded that the term "present jurisdiction" was used because in 1834, Ellis Island was a federal military installation over which New York had ceded jurisdiction and conveyed ownership. Thus, he rejected both States' contentions that Article II settled the question of sovereignty over an expanded Ellis Island. Report at 60-62.⁵

⁴ The Special Master correctly found that the land that now comprises Ellis Island was at one time after 1834 three separate islands. He noted that New York's expert produced a document "replete with evidence supporting th[e] conclusion" that "the three land masses were initially separate and inter-connected for purposes of communications by gangways built on pilings." Report at 95. Another of New York's experts confirmed those conclusions, as did a photograph that shows that Island No. Two was surrounded by water at one time. Report at 95-96, 13a. One of New Jersey's expert historians, James P. Shenton, cited numerous documents supporting the Special Master's conclusion. See P487, ¶¶28-29. The Special Master aptly concluded that New York could not claim jurisdiction under the Compact over any new islands created in the vicinity of Ellis Island after 1834. Report at 94.

⁵ New Jersey does not agree with the Special Master's view that Article II does not provide the answer to the question of whether New Jersey has sovereignty over the filled portions of Ellis Island. Article II only permits New York to exercise its "present jurisdiction" on Ellis Island, which was not "exclusive" but rather limited by its previous cession of jurisdiction to the federal government in 1800, and conveyance of property rights to the high water line of Ellis Island under the instruments of cession and conveyance. See Appendix A and B at 1a, 2a. Since New York's jurisdiction is limited in Article II, New Jersey has sovereignty over the filled lands under Article I because the lands are within New Jersey's territorial limits.

2. Sovereignty over the landfilled portions of Ellis Island; the common law of accretion and avulsion.

There is no dispute between the parties that the additions to Ellis Island after 1890 were artificially added by fill and that this constituted an avulsive and not an accretive occurrence. Report at 97. The Special Master concluded that the Compact does not specifically address the expansion by landfill of Ellis Island. The Special Master found that the determination of which State is sovereign over the portions of Ellis Island created by landfill is reached through application of the common law of accretion and avulsion.

The Special Master correctly determined that under the long-standing holdings of this Court, the boundary between two sovereigns is not altered by avulsion. Report at 98, citing *Arkansas v. Tennessee*, 310 U.S. 563, 566, 569-71 (1940); *Missouri v. Nebraska*, 196 U.S. 23, 35-36 (1904). As noted by the Special Master, application of this doctrine was recently reaffirmed by this Court in *Georgia v. South Carolina*, 497 U.S. 376, 404 (1990), as necessary to ensure that "one cannot extend one's own property into the water by landfilling or purposefully causing accretion."

Application of these principles led the Special Master to the correct conclusion that the filled portions of Ellis Island fall within the sovereignty of New Jersey. As the Special Master noted, "[n]either the United States nor New York can expand ownership or territorial claims to Ellis Island merely by adding to the land under water." Report at 99. Because Ellis Island was expanded through avulsion in the period after 1890, the sovereign boundary of the two States established in the Compact remains unchanged.

3. Prescription and acquiescence.

(a) *New York's claims and the Special Master's conclusion.*

New York argued that even if New Jersey was sovereign of the filled portions of Ellis Island under the Compact of 1834, New York had acquired sovereignty over the whole of Ellis Island under the doctrine of prescription and acquiescence.⁶ The Special Master was correct in finding as fact that since the Compact of 1834, New Jersey has exercised jurisdiction over the filled portions of Ellis Island through sovereign acts and New Jersey has never acquiesced in New York's isolated acts of prescription. Report at 2. New York failed to prove by a preponderance of evidence, both "a long and continuous possession of, and assertion of sovereignty over" the filled portions of the Island, and a lengthy acquiescence by New Jersey in New York's purported acts of possession and control over the disputed land. Report at 103, citing *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991); *Georgia v. South Carolina*, *supra*, 497 U.S. at 389.

The Special Master considered New York's claim in the context of four distinct periods. The first period covers the years from 1834 to 1890 when there was no landfill over which New York could exercise any governmental authority. Thus, New York could not claim prescription in that time. In the years from 1890 to 1934, the United States exercised virtually exclusive dominion and control for immigration purposes; and in the years from 1934-1955, the federal government used the Island for immigration and, to a limited

⁶ On the eve of trial, New York sought to amend its answer to include laches as an affirmative defense. New Jersey argued that laches cannot be employed as a substitute to proof of prescription and acquiescence. The Special Master denied New York's application but permitted New York to offer evidence relevant to that defense. Interim Op. at 51; Report at 27-29.

extent, for military purposes. After 1955, the Island was virtually abandoned until the Main Building was renovated and became the site of an immigration museum. In that last period, the Special Master found that New Jersey was "much too active in opposition to New York's jurisdiction for New York to carry her burden on acquiescence." Report at 106.

The Special Master exhaustively analyzed the extensive record and concluded that New York had failed to sustain her burden of showing that it had prescribed its laws in the filled portion of the Island during the years he deemed most significant to the analysis, notably 1890 to 1955. New York's acts, the Special Master concluded, were:

intermittent, often inconclusive and certainly disputed. Even assuming, arguendo, sufficient proof of prescription on New York's part, New Jersey did not acquiesce in her neighbor State's actions during the telling historical periods. The record reflects that from 1890 until this case was filed, New Jersey made consistent assertions of her underlying sovereign claims despite the pervasive federal presence in the Island's life. [Report at 144].

(b) Federal ownership and jurisdiction on Ellis Island

The Special Master correctly placed significant weight on the fact that during the relevant periods Ellis Island has been owned by and controlled by the federal government.⁷ Federal ownership and pervasive operational control left both states with little room to exercise their governmental power,

⁷ A survey prepared for this case indicates that the federal government filled 0.57 acres of New Jersey land outside the bounds of New Jersey's 1904 transfer of title to the United States. The Master stated that this territory "will remain within [New Jersey's] sovereign control." Report at 167, n. 70; Supp. Report, Survey A.

particularly since the federal government used the property for immigration and military purposes. Report at 110.

New Jersey maintained that since New York, unlike New Jersey, had ceded virtually all of its jurisdiction over the subject property to the federal government, New York was precluded as a matter of law from establishing prescription. The Special Master found that New York's cessions of jurisdiction did not necessarily foreclose New York from establishing prescription; nevertheless, he concluded that the fact that Ellis Island was a federal enclave was a "relevant and complicating factor in interpreting the quality of New York's prescriptive acts and New Jersey's countervailing acts of nonacquiescence." Report at 110-11.⁸

(c) *New Jersey's sovereign acts*

The Special Master found that during the relevant periods, New Jersey "maintained her dominion over the filled portion of the Island," Report at 124, and exercised sovereign authority over the disputed land. *Id.* at 123. The most significant of these sovereign acts, in the Special Master's opinion, was New Jersey's 1904 transfer of title to the submerged lands below the mean high water line of the

⁸ The Court should revisit the Special Master's analysis on this point. Although federal ownership and jurisdiction over the Island is certainly relevant to New York claims, the Court should find that New York's transfer of jurisdiction over the original Island and the surrounding lands under water left it with far too little governmental authority upon which to claim prescription. "When the United States acquires title to lands, which are purchased by the consent of the legislature of the state within which they are situated . . . the Federal jurisdiction is exclusive of all State authority." *United States v. Unzeuta*, 281 U.S. 138, 142 (1930). *Accord Murray v. Joe Garrick & Co.*, 291 U.S. 315, 318 (1934); *and see Macomber v. Bose*, 401 F.2d 545, 546 (9th Cir. 1968) (holding that cession of jurisdiction by a state results in federal government becoming the "only authority operating within the ceded area.").

original Island. Soon after the filling of these lands started, New Jersey objected to the appropriation of its property, and in 1904 the federal government agreed to acquire title. In 1880, New York purported to transfer title and jurisdiction over the "land covered with water, adjacent and contiguous to the lands of the United States, in the Harbor of New York, as . . . Ellis's" Island. Appendix H at 25a-26a. The federal government in 1904 rejected the validity of that transfer and instead sought title from New Jersey. Report at 112-13, citing T886, T953-T954, T4039-T4040; *see also* Report at 125-26 and Appendix C at 6a.⁹

The Special Master added that recognition by the federal government of New Jersey's legal status over the submerged lands was "real and measured." Report at 125. The United States Attorney General William H. Moody wrote to the New Jersey Board of Riparian Commissioners on July 15, 1904 and stated that lands on New Jersey's side of its boundary with New York were owned by and were under New Jersey's jurisdiction. Report at 125-6; *see also* P487, ¶23, citing P338, P351 at p. 4-5 and P342; P144 at 60-61, and Appendix C at 6a. Attorney General Moody stated that New York's jurisdiction and title were limited to "Ellis Island proper," referring to the land area comprising Ellis Island as it existed in 1834. T1447-22 to T1450-4. The deed described the transferred land as located in Hudson County, New Jersey and, at the request of the United States, the deed was recorded in New Jersey. Report at 124; *see also* P487, ¶26, citing P7 and Appendix D at 9a.

⁹ New York had prior to the Compact ceded jurisdiction over and conveyed title to Ellis Island to the federal government, in 1800 and 1808 respectively. The document of conveyance described the subject property as lands "situate in the Bay of New York, surrounded on all sides by the said bay which Island contains by estimation to ordinary high water mark two acres three rood and thirty-five perches . . ." *See* Appendix B at 2a. The area transferred is 2.97 acres. Report at 160-61, n.65

Additionally, New Jersey included Ellis Island on the tax rolls of Jersey City, New Jersey from as early as 1940. The property was listed as exempt realty since it was owned by the federal government. Report at 131. There was evidence, too, of utility taxes for water and gas metered in and paid to New Jersey. Report at 123. New Jersey also issued a waterfront development permit for Ellis Island construction projects in 1933, an assertion by New Jersey of its governmental authority over the development of the waterfront on Ellis Island. Report at 134-135.

In this same period, New Jersey requested that the federal Department of Labor and other federal agencies employ New Jersey workers on Ellis Island projects. The record, as the Master explained, is "replete" with evidence that New Jersey officials, including federal Representative Mary T. Norton, and representatives from labor unions asserted rights on behalf of New Jerseyans to Ellis Island jobs. Report at 133.

In the years after 1955, when the federal government ceased using Ellis Island as an immigration station, and was considering a sale of the property, the dispute between the States sharpened and both States debated the future of the Island, along with its jurisdictional status. Extensive hearings were conducted by a subcommittee of the United States Senate, chaired by Senator Edmund S. Muskie, and the United States Senators from New Jersey and New York participated. Senator Kenneth Keating of New York conceded that a potential sale of the Island was of interest to the Senators from both states. Report at 137. Officials from New Jersey, including the Mayor of Jersey City, attended the hearings and asserted New Jersey's claim to sovereignty over the filled lands. *Id.* In June 1963, after the hearings, Senator Clifford P. Case of New Jersey suggested that New Jersey

and New York enter into a compact concerning jurisdiction of Ellis Island. Report at 138; *see also* P487, ¶¶69-78 ¹⁰

Subsequently, as the Special Master noted, the National Park Service engaged in a series of planning initiatives for the Island and included representatives from New Jersey and New York in the process. Report at 142-43. The planning documents refer to New Jersey and New York. Report at 142-43; *see also* P487, ¶¶81,82, citing P166 and P170 at 9, and Appendix E at 13a. Further, in 1986, after the National Park Service had restored the Main Building on the Island, the Governors of New Jersey and New York endeavored to resolve the dispute over jurisdiction by entering into a Memorandum of Understanding. The Governors agreed to use their best efforts to have legislation enacted which would allow the sharing of tax revenues attributable to Ellis Island (as well as Liberty Island) and have those funds utilized for programs for homeless persons. Report at 143-44, citing 17a-23a. The agreement was in response to New Jersey's assertion of sovereignty and recognition by New York's Chief Executive that New Jersey had the power to levy taxes on the Island. *See* Report at 17a-23a. The agreement was incorporated into law by the State of New Jersey in 1987. *See* N.J. Stat. Ann. 32:32-1 *et seq.* (1990). New York failed to enact the necessary legislation.

¹⁰ The Special Master correctly pointed out that New York officials fully recognized that New Jersey was asserting a claim to Ellis Island. The Mayor of New York City attended the subcommittee hearings and commented, "I think the question of jurisdiction could be ironed out by a meeting of the minds" Report at 137, quoting from P143. Also, in 1965, then Representative John V. Lindsay, who later served as Mayor of New York, recognized in a statement to the House that the filled lands were never New York property and "pertained to the jurisdiction of New Jersey." Report at 138-39, quoting from P154.

(d) *Federal recognition of New Jersey's sovereignty*

The Special Master determined that not only did New Jersey repeatedly assert its claim of sovereignty to the filled portions of Ellis Island, the federal government recognized New Jersey's dominion over the lands during the relevant prescriptive periods. The Special Master found that such recognition was evidenced by the agreement of the federal government, communicated by the United States Attorney General, to request and accept a deed for the underwater lands around the original Island. Report at 124-126; *see also* Appendix C at 6a. Also, the Special Master correctly pointed out that maps produced by the federal government during the period of a state's putative dominion and possession are a relevant indication of the federal government's view on state sovereignty. Report at 119, citing *Michigan v. Wisconsin*, 270 U.S. 295, 316-19 (1926); *Louisiana v. Mississippi*, 202 U.S. 1, 55-57 (1906).

The Special Master found that commencing in 1890, with the onset of large-scale filling of underwater lands around Ellis Island, the federal government issued the first in a series of surveys entitled, "Pierhead and Bulkhead Lines for Ellis' Island, New Jersey, New York Harbor, as recommended by the New York Harbor Line Board." Report at 118-22; *see also* Appendix F and G at 15a-24a. These maps, which were approved by the Secretary of War, are "especially probative of the federal view about sovereignty over Ellis Island." Report at 120.¹¹ One of the surveys was approved

¹¹ The Special Master commented that these maps were to be relied upon for "navigational and defense purposes." Report at 119. That may be true, but the maps were critical to the filling of the submerged lands around the original Island. Without the extension of pierhead and bulkhead lines for Ellis Island, there could have been no expansion of the Island into New Jersey waters. The federal New York Harbor Line Board was established by Act of Congress on August 11, 1888, authorizing the Secretary of War to establish harbor lines beyond which no piers or wharves could be

by Secretary of War Elihu Root, a fact that the Special Master correctly viewed as significant because Root was a distinguished lawyer, active in New York City politics, who later became United States Senator from New York. Report at 120; *see also* Appendix F at 22a.

The Special Master found other evidence of federal recognition of New Jersey's sovereignty over the filled portions of Ellis Island. The waterfront development permit issued by New Jersey in 1933 was in response to an application by the Commissioner of Immigration for the Port of New York, Edward Corsi. Report at 134-34; *see also* P487, ¶28, citing P10, P11. Like Elihu Root, Corsi was a prominent New Yorker. The Special Master noted that Corsi's actions manifested an understanding that although New Jersey had divested itself of property rights to the submerged lands in 1904, it remained the State with sovereign authority in waterfront development matters pertaining to the Island. Report at 135, citing T1288 to T1290, T2549 to T2553, T1367 to T1368. Corsi's view was also accepted by the Department of Treasury and the Army Corps of Engineers, who referred to the location of the 1933 construction projects as located in "Ellis Island, New Jersey." Report at 135, citing P487, ¶27, citing P374, P375, P376, P377, P378, P379 and P380.

Additionally, as the Special Master found, in the 1930's and 1940's, federal officials addressed questions of the location of Ellis Island for the implementation of federal work programs and establishment of wage rates. In 1934 and 1935, the Immigration and Naturalization Service cooperated with

extended nor deposits made in New York Harbor and adjacent waters, except as regulated by the Secretary of War. 25 Stat. 400, 425, P.L. 1888, c.860, §12 (August 11, 1888). The maps were, in essence, a blueprint for the growth of the Island and the designation of the Island as "Ellis Island, New Jersey," a clear and unequivocal statement of the federal government's view that the filled lands were in New Jersey. Appendix F and G at 15a-24a.

the Departments of Treasury and Labor for an equitable distribution of labor between New Jersey and New York for public works projects. The federal action was in response to demands by New Jersey officials and unions seeking work for New Jerseyans on Ellis Island. This was, in the Master's opinion, evidence of non-acquiescence on the part of New Jersey because "New Jersey was basing her claims to jobs for her citizens on her sovereignty over the filled portion of Ellis Island" Report at 132.

The Immigration and Naturalization Service and the Department of Labor again addressed the issue of locality of Ellis Island in the 1940's for purposes of establishing Davis-Bacon wage rates. From 1947 to 1949, the Department of Labor ruled that "New York building trades wage rates . . . *are not* applicable to construction on Ellis Island" P487, ¶46, citing P61 (emphasis in original); *see also* Report at 135, citing P76-85, P490 ¶79. The Secretary of Labor issued formal decisions stating "Ellis Island [is in] New York Harbor, in Hudson County, New Jersey." P62, P63.¹²

In addition, the Special Master found evidence of federal recognition of New Jersey's sovereignty in a legal opinion of the federal Government Services Administration issued in 1963. Report at 140-142. The opinion was prepared at the request of the Senate Subcommittee on Intergovernmental Relations, which recognized that the jurisdictional dispute between New York and New Jersey was hindering plans to sell Ellis Island. This exhaustive legal opinion, which the Special Master found highly probative, specifically states that the "filled-in area" of Ellis Island is "part of New Jersey." Report at 140, citing P144 at 70; *see also* P143 and P144 at 3-4. Notably, the conclusion of the General Services

¹² On June 16, 1949, the Secretary of Labor revised the previous determinations of locality from New Jersey to New York, with no documented explanation. P487, ¶¶45-47 citing P60-P92, P428-P434, P436-P445; *see also* T2641-22 to T2645-17.

Administration ("GSA") has been consistently followed by the federal government since it was issued in 1963. Report at 141.¹³

The Special Master added that the GSA opinion formed the basis for the legal arguments advanced by the federal government in *Collins v. Promark Prods., Inc.*, 956 F.2d 383 (2d Cir. 1992). In that dispute, the United States Attorney for the Southern District of New York, representing the National Park Service, argued that the worker's compensation laws of New Jersey should apply to the claims of a worker injured on the filled portions of Ellis Island, since the landfilled areas are part of New Jersey and under its jurisdiction. Report at 141; *see also* P487, ¶90 and Report at 144.

(e) *New York's prescriptive acts were isolated and episodic.*

The Special Master carefully considered New York's evidence of prescriptive acts and found them to be "intermittent and equivocal." Report at 145. The Special Master noted that New York's evidence fell short of the "unequivocal acts of prescription demanded by this Court's jurisprudence." *Id.* New Jersey had not challenged New

¹³ The National Park Service maintained this position in a 1968 Master Plan for Ellis Island, P166, and in an "Analysis of Alternatives" issued in December 1980. Report at 142-43, citing P484 at 9; *see* Appendix E at 13a. The latter document provided a regional setting for the Island, stating that the acreage created by landfill, as well as the surrounding waters, are part of New Jersey. In 1984, the Park Service nominated Ellis Island for a place on the Federal Register of Historic Places and identified the location of the Island as New York and New Jersey. This document was included as an appendix to publications of the National Park Service about the history of Ellis Island and its structures. D74, Vol. III, pp. 1343-50. The covers and contents of each publication refer to Ellis Island as located in both states. Report at 143, citing D952.

York's jurisdiction over the original Island. Thus, as the Master determined, New York was required to demonstrate that its prescriptive acts were taken with regard to the filled lands rather than the original Island. Report at 111. The Special Master concluded, "New York has been able to establish only isolated or episodic prescriptive actions -- and without certainty that these acts occurred on the landfill. The evidence taken as a whole does not prove prescription over the landfill." Report at 118.

The Special Master stated that New York had presented evidence pertaining to the recording of births, deaths and marriages on Ellis Island. The Special Master found, "[t]he evidence of many of these acts is inconclusive with respect to the landfilled portion of the Island." Report at 114. New York's evidence of taxation was also determined by the Special Master to be deficient. As the Master wrote, "New York failed to present more than a scintilla of evidence of her taxing authority in the relevant periods before 1955. Her limited evidence from later years failed to pinpoint the filled portions of the Island." Report at 130.

According to the evidence, New York did not levy or collect taxes attributable to activities on the filled lands until six years ago, hardly a sufficient period to constitute prescription. Since 1990, ARA Leisure Service, Inc. has been charging and remitting tax on certain sales on the Island, and has paid certain corporation taxes to New York State and New York City. There was no other evidence that any person or entity has paid New York taxes with regard to activities on the filled lands.¹⁴

¹⁴ The Special Master found the minimal evidence produced by New York "unconvincing," consisting merely of testimony of a National Park Service employee that he provided New York City non-resident tax forms to federal employees, without any direct evidence of taxes paid by these employees. Report at 115.

The Special Master found that this evidence suffered from two significant weaknesses. First, by 1984 the States' dispute regarding the landfilled portions of the Island had been "cemented." Report at 131. In addition, the evidence of taxation concerns activity in the period after execution of the 1986 Memorandum of Understanding in which New York's Governor recognized New Jersey's authority to collect taxes associated with Ellis Island. The Special Master found that the Memorandum's explicit recognition of New Jersey's right to share the tax revenue collected by *both* States on Ellis Island "nullifies whatever probative value these relatively recent taxing activities might have otherwise been accorded." Report at 131-132.

Further, the Special Master commented that Ellis Island had "apparently" been included in the jurisdiction of the New York City Metropolitan Police Department. Report at 114. The Master suggested that there were two examples of the City exercising its police jurisdiction over Ellis Island but, in this regard, there is no credible evidence that New York enforced its criminal law with regard to any actions on Ellis Island. New York also has no credible evidence that it provided police protection on the Island. T2595-4 to T2614-1 and T3950-23 to T3961-10. New York police did not patrol the Island and there is no documentary proof that the Harbor Police did anything other than patrol the waters around the Island. In any event, as the Special Master commented, whatever actions were taken by New York were offset by New Jersey's own policing of the Island. Report at 114, citing T3636 to T3637.

New York's evidence regarding voting was also considered by the Special Master. New York did not present evidence that any Ellis Island resident voted in a New York election; its evidence only shows that certain individuals were registered to vote in New York. Additionally, New York only presented registers for eight of the more than one hundred years in which New York claimed prescription.

Report at 112, n.43, citing D957-65. Furthermore, since 1953 there has been no person registered to vote in New York who claims a residence on Ellis Island.¹⁵

The Special Master also considered New York's evidence that the federal government used letterhead, date stamps and forms which reference "Ellis Island, New York Harbor, New York" or "Ellis Island, New York." This evidence was offered in an effort to show that there was a general public perception that Ellis Island was part of New York. But the Master found the evidence unpersuasive. The evidence failed to distinguish between the filled and original portions of the Island. There was no indication that the federal government intended by its use of letterhead to make any jurisdictional statement. Moreover, New Jersey presented testimony that post office and immigration service district designations did not follow state lines or boundaries. Report at 116-17, citing T3944, T1494, P490 ¶¶129-34.¹⁶

¹⁵ The Special Master agreed with New Jersey that New York City voting maps provided for nine years did not include the filled lands, but rather "depict the original almond-shaped island." Report at 112, n.43. These maps indicate that New York's inclusion of Ellis Island in its voting districts was limited to the original 2 3/4 acre Island. This is made plain by the fact that the maps also depict Oyster Island, which was dredged away before 1900. D932 at p. 9. Clearly, the Ellis Island depicted on the voting maps is the original Island before it was surrounded by some 24 acres of fill.

¹⁶ New Jersey's expert witness Marian L. Smith, Historian for the United States Immigration and Naturalization Service, testified that from 1891 to 1956, northern New Jersey was part of the New York District and that district boundaries have never been dependent on State lines. The letterhead for the Immigration Station at Ellis Island reflects the location of the main administrative office and post office located on the original Island. T3942-21 to T3950-22.

(f) *A century of conflict is not acquiescence .*

In the Special Master's opinion, New York had "cobbled" together intermittent and equivocal prescriptive acts from the various prescriptive periods. These acts were repeatedly refuted by New Jersey's assertion of dominion over the landfill. New York failed to establish, in the years from 1890 to the present, prescription and acquiescence. Report at 145. The Special Master concluded that the evidence illustrated a jurisdictional conflict between New Jersey and New York over Ellis Island that had persisted for more than one hundred years. Quoting from the Court's decision in *New Jersey v. Delaware*, 291 U.S. 361, 377 (1934), the Special Master determined, "[a]cquiescence is not compatible with a century of conflict." Report at 145.

C. *The recommended boundary on Ellis Island.*

The Special Master has recommended that the boundary between New York and New Jersey be drawn at the low water line of the Island as it existed in 1834. The Special Master reached this conclusion by relying on an offer by New Jersey in 1827 to allow New York to exercise jurisdiction over Ellis Island, and other islands on the New Jersey side of the river, "to the low water mark of same." Report at 72. The Master recognized, however, that the Compact did not include any reference to low water regarding Ellis or any other island and he recognized, too, that he could not resolve with "complete confidence what the parties intended" regarding mean high water or low water. Nonetheless, he suggested that the Court "grant to New York sovereignty over the original or 1833 Ellis Island to the low-water mark thereof." Report at 154.

The Special Master further determined that the most accurate depiction of the Island in 1834 was a map, prepared by the United States Coast Survey in 1857. Report at 157-158. The Master determined, based on testimony of New

York's witnesses, that the area above mean low water, based on that survey was 4.69 acres. Report at 160. To that acreage, the Master added some 0.2 acres, representing a portion of the pier that extended from the Island. The pier was in place in 1834. Over New Jersey's objection, the Master accepted New York's evidence that the pier was built on solid fill and should be included as part of New York's territory. Report at 158-159.

Although finding that the 1857 Survey was the best depiction of the Island at the time of the Compact, the Special Master nevertheless recommended that the Court not base its boundary on the clearly identified low water line which appears on that map. Instead, the Special Master found that considerations of practicality and convenience warrant the creation of a different, and in the Master's view, better boundary. A "template" approach, which involves placing the 1857 line on a current map of the Island, would be "overly literal" and unfair to New York. Report at 163.

The considerations offered for departure from the readily identifiable boundary line were as follows: buildings would be intersected by the boundary line, New York would be left with "thin strips" of New Jersey land between the Main Building and the ferry slip, New York would be "enclaved" by New Jersey on the Island and somehow the arrival of visitors to the Island by landing on New Jersey territory would cause "disruption." Report at 162-163.

The Special Master thus drew his own boundary, leaving the whole of the Main Building in New York, with adjacent land providing access to the ferry slip. The Special Master also determined to include the remains of Fort Gibson (built before the War of 1812) and the Railroad Ticket office behind the Main Building within New York, along with land facing out into the harbor. The Master's goal was to create a land area with acreage that was as close to 4.89 acres as possible. Survey A, which the Special Master chose as the basis of his

recommendation, actually added additional land to the New York section, for a total of 5.1 acres.

SUMMARY OF ARGUMENT

Although the Special Master correctly determined that New Jersey is sovereign over the underwater lands on its side of the boundary established in the 1834 Compact, and that New York has jurisdiction over only that portion of Ellis Island that existed in 1834, he mistakenly determined that New York's territory extends to the low water mark of the original Island. New Jersey takes exception to the latter decision, contending that the States' boundary should be drawn at the 1834 mean high water line. New Jersey's position is based on the language of Article II of the Compact, a reading of the Compact as a whole, past construction of the Compact, and the law of adverse possession. New Jersey also takes exception to the Special Master's conclusion that a portion of a pier extending from the Island in 1834 was built on fill and that New York should be given jurisdiction over that area. Nothing in the record supports the Special Master's finding with respect to the pier, nor justifies deviation from the mean high water line as the States' boundary.

In addition, New Jersey supports the Special Master's conclusion that the 1857 United States Coast Survey is the best available evidence of the size and shape of the 1834 Island. However, the Special Master erred in declining to use the 1857 Survey to draw the States' boundary. Thus, New Jersey takes exception to the Special Master's recommendation that the Court reshape the entire length of the boundary to address matters of practicality and convenience that he predicts will arise from acceptance of the line delineated in the Compact. The Special Master's concerns are not supported by evidence in the record, his recommended boundary does not comport with the terms of the Compact, which was approved by both States and Congress, and his

proposed remedy expands New York's jurisdiction to cover 5.1 acres, almost twice the amount of land to which it is entitled.

ARGUMENT

POINT I

NEW JERSEY IS SOVEREIGN OVER THE LANDFILLED PORTIONS OF ELLIS ISLAND ADDED BY THE FEDERAL GOVERNMENT, TO THE MEAN HIGH WATER LINE AS IT EXISTED WHEN THE COMPACT WAS ADOPTED.

A. The Special Master's recommendation is not supported by the Compact, relevant case law, or the record.

The Special Master correctly concluded that under Article II of the Compact, New York has jurisdiction only over Ellis Island as it existed at the time the Compact was adopted. The Special Master further concluded that the "Ellis Island" over which New York had jurisdiction included all lands down to the low water mark of the original Island, rather than to the mean high water line as New Jersey argued. New Jersey excepts to this finding and, for the reasons that follow, New Jersey's exception should be sustained.

To decide that New York's jurisdiction extended to the low water mark, the Special Master relied upon a fragment of the record of the unsuccessful negotiations of 1827 between New Jersey and New York which were an effort to resolve the dispute between the States over their boundary. The Special Master noted that during the negotiations of 1827, New Jersey at one point offered the following to New York: a boundary line down the middle of the Hudson River and Bay of New York; concurrent jurisdiction over the navigable waters established by such boundary line; and "the islands

called Bedlow's Island, Ellis' Island, Oyster Island and Robins Reef, *to the low water mark of same*, be held to be and remain within the exclusive jurisdiction of the state of New-York." Report at 72, (emphasis in Report) citing P280-P292. The Special Master reasoned on the basis of the offer and on caselaw that when the Compact was adopted by the States in 1834, the States most likely intended New York's jurisdiction over Ellis Island to extend to the low water mark.

The Special Master also invoked public convenience and practicality to determine the States' probable intent. The Special Master reasoned that it would have been extremely inconvenient to accord sovereignty to one State to the land to the high water mark or vegetation line, and to accord to the other State sovereignty on the land below the high water mark. He further reasoned that public convenience currently "counsels that New York should have access to the Harbor from her sovereign territory. Drawing the boundary at the MLW [mean low water mark] satisfies this concern." Report at 155.

B. Reliance by the Special Master on an offer rejected in 1827 was unsound, particularly where that evidence contradicts the plain language of the Compact and its overall design.

The Special Master's reliance on one pre-Compact offer of 1827 to decide what the States intended regarding New York's jurisdiction over Ellis Island is misplaced. The negotiations of 1827 were the second of three efforts by New Jersey and New York to resolve their differences over their boundary. The offer of 1827 that formed the basis of the Master's decision was, as he notes, rejected. The 1827 negotiations failed, New Jersey filed suit in this Court to resolve the dispute and another set of negotiations followed before the States agreed to the 1834 Compact. Under such circumstances, it is untenable to rely upon the exchange of

rejected negotiating points in 1827 as a basis for determining what the States intended when they agreed to the Compact some seven years later.

Certainly, far more significant is the fact that the Compact itself contains no reference to low water in Article II. Article II does not state that New York's jurisdiction on Ellis Island extends to low water, even though low water was mentioned during the 1827 negotiations and even though low water is explicitly referenced in Article III of the agreement. Indeed, as the 1827 negotiations and Article III of the Compact clearly indicate, in 1834, the States were familiar with the concepts of both the mean high water and the low water mark, but excluded any reference to low water from Article II. Given this exclusion, Article II should be interpreted in accordance with its plain meaning, not so as to include the omitted reference to low water. *Oklahoma v. New Mexico*, 501 U.S. 221, 245, 247 (1991)(Rehnquist, C.J., concurring and dissenting); *Carchman v. Nash*, 473 U.S. 716, 724-27 (1985); *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 938 (1984); *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)("Texas I").

The absence of any reference to low water in Article II further indicates that the States intended to limit New York's jurisdiction on Ellis Island to the land area above the mean high water mark. The relevant section of Article II refers not only to Ellis Island but also to other islands as well. This Court has held that an "island" is a body of land completely surrounded by water at high tide, not at low tide. *United States v. California*, 382 U.S. 448 (1966). This definition is consistent with Article 10 of the Law of the Sea, adopted at the United Nations Conference on the Law of the Sea held in 1958. Likewise, in *United States v. Alaska*, 65 U.S.L.W. 4457 (1997), this Court explicitly held that the Dinkum Sands formation was not an "island," because it was frequently below mean high water. Since the Compact makes specific reference to Ellis and other "islands," and since the Compact

does not extend New York's jurisdiction to the low water mark, the Compact should be interpreted in accordance with the general understanding of the term "island."

In addition, the Compact should be interpreted as a whole so that all its parts are harmonized. See *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 509 (1986); *Carchman*, *supra*, 473 U.S. at 724-26; *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249-54 (1985). Interpreting Article II to extend New York's jurisdiction to the low water mark around the original Ellis Island would be contrary to the overall design of the Compact. As this Court determined in *Central R.R. Co. v. Mayor of Jersey City*, *supra*, the dominant purpose of the Compact is to draw a boundary line between the States and make New Jersey sovereign over all of the lands under water on the New Jersey side of the boundary line. Article III (1) provides that New Jersey "shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York" Report at 5a. Justice Holmes stated for the Court in *Central R.R. Co.* that the "right of property in the compact between the states is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits." 209 U.S. at 478.

When the Compact was adopted, the term "lands under water" was understood to include all tidally-flowed lands, up to the mean high water mark. Thus, "lands under water" include both lands that are always under water and lands that are under water at high tide, but uncovered at low tide. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 220 (1845); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842); *Mobile v. Hallett*, 41 U.S. (16 Pet.) 261, 265 (1842); *Arnold v. Mundy*, 6 N.J.L. 1, 76-78 (N.J. 1821). Cf. *Alabama v. Georgia*, 64 U.S. 505, 515 (1859) (holding that the riverbed encompassed both lands always under water, and lands sometimes under water). The Compact must be interpreted in light of the common understanding of the term "lands under

water" that existed in 1834. *Texas v. New Mexico*, 482 U.S. 124, 128-29 (1987)(*Texas II*); *Corbin on Contracts*, §551 (Rev. ed. 1993).

Thus, under Article I, New Jersey is sovereign over the lands under water around the original Island, up to the high water mark. Since Article II does not explicitly extend New York's jurisdiction to the low water mark around Ellis Island as it existed in 1834, there is no limitation on New Jersey's sovereignty over the under water lands to the high water line around the Island, based on the generally held understanding at the time the Compact was made of the meaning of the term "lands under water."

That this is so is further evidenced by reference to Article III of the Compact which provides that New York shall have extra-territorial jurisdiction over the lands "covered" by water "to the low water-mark on the westerly or New Jersey side thereof." Report at 4a. The reference to the low water mark within Article III shows the States' shared understanding that the term "land under water" extends to the mean high water mark. Without the reference to low water in Article III, New York's jurisdiction would have extended to the high water mark of the New Jersey shoreline. The absence of any reference to low water in Article II makes abundantly clear that the States intended to strictly limit New York's jurisdiction on Ellis Island to the Island above mean high water.

C. New Jersey's 1829 complaint is more persuasive evidence regarding the intent underlying the 1834 Compact.

Rather than look to a fragment of the history of the 1827 negotiations between the States, the Special Master should have accorded significant weight to the Complaint filed by New Jersey in this Court in 1829 seeking resolution of its boundary dispute with New York. In that action, New Jersey

contested New York's claim to the whole of the Hudson River and the dividing waters between the States and controverted New York's claim that it had exercised jurisdiction over the whole of those waters. New Jersey said that New York's jurisdiction had only been exercised on certain islands, not the waterways. In its Complaint, New Jersey stated that New York "became wrongfully possessed of Staten island and the other small islands in the dividing waters between the two states . . . [which] had been since acquiesced in . . . New York has no other pretense of title to said islands but adverse possession; that, as such possession has been uniformly confined in its exercise to the fast land thereof" See Report at 7, citing *In re Devoe Mfg. Co.*, 108 U.S. 401, 407 (1883). Thus, New Jersey asserted that New York had no claim to Ellis Island other than a claim of adverse possession and that New York's adverse possession had been confined to the "fast land" of Ellis Island.¹⁷

New Jersey's Complaint of 1829 represented its formal position before the Compact was adopted. It should be given much stronger weight than an earlier offer which was made during unsuccessful negotiations and rejected seven years before the Compact was adopted. Under basic principles of contract law, that rejected offer did not thereafter become part of the agreement between the States. *Corbin, supra*, Vol. I, ¶3.41.

The reference to "fast land" in New Jersey's Complaint further supports limiting New York's jurisdiction on Ellis Island to the mean high water mark. "Fast land" is vegetated land and does not include under water land that is tidally-flowed such as land below the high water mark. See *United*

¹⁷ New Jersey's pleadings in *Devoe* did not constitute a concession by New Jersey that New York had acquired sovereignty over Ellis Island, as stated by the Special Master. Report at 7. New Jersey merely characterized New York's only possible claim to the Island as one grounded on allegations of adverse possession.

States v. Willow River Power Co., 324 U.S. 499, 509 (1945); *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900); *Shively v. Bowlby*, 152 U.S. 1, 17, 57-58 (1894); *Hill v. United States*, 149 U.S. 593, 595 n.3 (1893); *In re Sutter*, 69 U.S. (2 Wall.) 562, 586 (1864); *Jones v. Souland*, 65 U.S. (24 How.) 41 (1860); *Ward Sand & Materials Co. v. Palmer*, 237 A.2d 619 (N.J.1968); *Harz v. Board of Navigation and Commerce*, 7 A.2d 803, 897 (1939), *aff'd*, 12 A.2d 879 (N.J. 1940).

Moreover, a claim of adverse possession extends only to land that is actually occupied, and cannot extend to land that is unoccupied and rightfully held by someone else. See *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47 (1921); *Hunnicut v. Peyton*, 102 U.S. 333 (1880). Before the Compact was adopted, New Jersey did not agree that New York's "present jurisdiction" extended to low water, but instead asserted that it had been confined to the "fast land" above high water. Moreover, at that time, the fast land that now lies between the mean high and low water marks of 1834 did not exist and therefore could not have been previously obtained by adverse possession. Accordingly, Article II settled the question of which State would exercise jurisdiction over the "fast land" of Ellis Island, but did not encompass the tidally-flowed lands below the mean high water line which subsequently were filled by the United States.

D. Practical construction of the Compact since 1834 supports New Jersey's interpretation.

New Jersey's interpretation of Article II also is supported by the practical construction of the Compact that occurred after 1834. As the Special Master concluded, the landfilling conducted by the United States after 1890 was an avulsive change that did not alter the boundary set in 1834. Report at 97-99. However, that landfilling included the filling of lands between the mean high water mark of 1834 and the mean low water mark. Starting in 1892, New Jersey insisted that the

United States secure a deed to the lands under water which were being filled. P383(a), P405, P1 at 11.

In 1904, the United States acquiesced in New Jersey's demands. United States Attorney General Moody wrote to New Jersey's Board of Riparian Commissioners and recognized that New York's ownership and jurisdiction was limited to Ellis Island "proper." The federal government secured a deed from New Jersey for the underwater lands, and had the deed recorded in New Jersey. That deed included the area between mean high water and mean low water. P4, P5, P7, P339-P341, P351; T695-15 to T706-41; and Appendix at D at 9a.

Previously, by 1808, New York conveyed title and jurisdiction over Ellis Island to the United States. The deed provided for the transfer of the land above mean high water. T326-1 to T327-3 and T2943-19 to -23; *see also* Appendix B at 2a. In 1880, New York purported to convey to the United States certain lands covered by water around Ellis Island. *See* Appendix H at 25a. In 1904, Attorney General Moody explicitly determined that the 1880 deed and cession of jurisdiction was of no force and effect. He stated that although there was no question of New York's ability to transfer the original Island and jurisdiction to the United States, under the Compact, New Jersey owned the lands under water around "Ellis Island proper." *See* Report at 125-26 and 152; *see also* Appendix C at 6a.

The Special Master correctly concluded that the 1904 conveyance by New Jersey was a sovereign act. *See* Report at 124-125. His finding that in 1834 the States most likely intended New York's sovereignty to extend to low water is completely inconsistent with his conclusion regarding the 1904 conveyance as well as inconsistent with the prior acts of New York in its conveyance and cession of jurisdiction over Ellis Island to the high water mark by 1808. Despite its attempted conveyance of 1880 of submerged lands around

Ellis Island, New York did not object to New Jersey's actions in 1904, or to the recording of the deed in New Jersey. New York indicated by its silent acquiescence to the 1904 conveyance that New Jersey was owner of the lands below mean high water and, as this Court determined in *Central R.R. Co.*, ownership of those lands was indicative of "ultimate sovereign rights." Thus, the conduct of both States and the United States in 1904 demonstrates an understanding that New Jersey's territory and sovereignty extended to the mean high water mark around the original Island. This practical construction of the Compact must be accorded significant weight. *Vermont v. New Hampshire*, 289 U.S. 593 (1933); *Michigan v. Wisconsin*, 270 U.S. 295, 307 (1926); *Louisiana v. Mississippi*, 202 U.S. 1, 57 (1906).

E. Unsubstantiated practical concerns do not justify extending New York's jurisdiction to the low water mark.

In determining that the States probably intended New York's jurisdiction over Ellis Island to extend to the low water mark, the Special Master also invoked public convenience and practicality. The Special Master concluded that it would have been extremely inconvenient to limit New York's jurisdiction to the high water mark when the Compact was adopted, and that it also would be inconvenient to do so today, as this limitation would require New York to pass through New Jersey territory to reach New York Harbor from the Main Building on New York's territory. Report at 155.

New Jersey takes exception to this approach. First, practical concerns about a boundary on Ellis Island today hardly provides insight into the probable intention of the States in 1834. Second, the Master wrongly suggested that it would have been "extremely inconvenient" to limit New York's jurisdiction in 1834 to the Island at the high water line. He posits a practical concern that the original Island

would have been "enclaved" by a ring of land between the high water mark and low water. This concern is simply unfounded.

In 1834, when the boundary was drawn, Ellis Island was owned by the federal government and operated as a military installation. New York previously had ceded its jurisdiction over the Island to the federal government. No genuine practical difficulty could arise if New York's jurisdiction was limited to the land above mean high water because New York's jurisdiction was virtually non-existent and retention by New Jersey of sovereignty over the submerged lands around the Island would not impede the operation of the federal facility. Indeed this was apparently the view of Congress when the United States consented to the Compact of 1834. That consent carried with it the *proviso* that nothing in the agreement "shall be construed to impair or in any manner effect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement." Report at 8a.

Furthermore, the States fully understood that Ellis Island would be on the New Jersey side of the newly created boundary, completely surrounded by New Jersey waters. The States recognized that the Island would be and remain "enclaved" by New Jersey territory. The States knew that it would always be necessary to pass through New Jersey territory to reach Ellis Island. The States apparently did not believe that this arrangement would give rise to impracticalities. Even if such practical concerns did arise, and there is no evidence whatsoever to that effect, any perceived impracticality is a function of the Compact adopted by the parties. This Court should not attempt to rewrite that agreement by ordering relief that is not consistent with the Compact. *Texas II, supra*, 482 U.S. at 124; *Texas I, supra*, 462 U.S. at 564; *Arizona v. California*, 373 U.S. 546, 565 (1963).

In support of his conclusion that New York's jurisdiction extends to low water, the Special Master cited *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820). But *Handly's Lessee* does not support the Master's conclusion. In *Handly's Lessee*, the Court invoked public convenience and concluded that as a general rule, a sovereign bounded by a river holds to low water, not high water. However, under the Compact New Jersey is not bounded by the shore of the Hudson River and New York Bay, but is bounded by the middle of the Hudson River and the Bay. All of Ellis Island lies within New Jersey's boundary, and therefore Ellis Island constitutes a narrow exception to the boundary. Public convenience and practicality do not require this exception to be broadened beyond the plain language of Article II, in a manner that is inconsistent with Articles I and III, and with the practical construction of the Compact since 1834.

In sum, the Special Master mistakenly based his decision concerning the low water mark on one small portion of the pre-Compact negotiations of 1827, inapplicable legal precedent and on unfounded practical concerns. The plain language of Article II, the Compact as a whole and better evidence of New Jersey's position pre-dating the Compact, notably New Jersey's Complaint filed in 1829, show that New York's jurisdiction on Ellis Island extends only to the high water mark of the original Island.

POINT II

THE SPECIAL MASTER ERRED IN MODIFYING THE BOUNDARY TO ADDRESS CONSIDERATIONS OF PRACTICALITY AND CONVENIENCE, NO EVIDENCE OF WHICH APPEARS IN THE RECORD. THUS, THE COURT SHOULD DECLINE TO REDESIGN THE BOUNDARY ESTABLISHED IN THE 1834 COMPACT APPROVED BY BOTH STATES AND CONGRESS.

The Special Master correctly concluded that the boundary between the States on Ellis Island was determined by the 1834 Compact executed by both States, with the consent of Congress. Report at 89. However, the Special Master's recommendation that the Court modify the boundary defined in the Compact in order to alleviate perceived practical considerations should not be accepted by the Court. The record contains no evidence to support the Special Master's speculation that application of the boundary established in the Compact would result in practical difficulties or inconveniences for the States. Therefore, departure from the boundary delineated on the 1857 United States Coast Survey, which the Special Master found to be the best evidence in the record to determine the size and location of Ellis Island as it existed in 1834, is unwarranted.

The record contains extensive evidence supporting the Special Master's determination that the 1857 Survey is an accurate depiction of Ellis Island as it existed at the time of the Compact. As noted by the Special Master, the Survey was the work of the United States Coast Survey, a governmental agency whose "mapmakers are presumptively careful and reliable." Report at 157; *see also Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10 (1935). In fact, in 1857 the agency gathered tidal data within New York Harbor and incorporated that data in its surveys in accordance with a 40-step procedure. Based on these procedures, the work of the

Coast Survey is regarded as highly accurate and sophisticated for its day. Aaron L. Shalowitz, *Shore and Sea Boundaries* (U.S. Government Printing Office, 1964) at 79; T812-16 to T814-21. New York's experts, Drs. Squires and Swanson, did not refute these facts, instead generally concurring that the United States Coast Survey used the best methodology available to its employees. See T3430-24 to T3431-20.

In addition, the Survey was prepared specifically to depict only Ellis, Liberty, and Governor's Island, rather than a greater portion of New York Harbor. Thus, as the Special Master found, the Survey "does not sacrifice accuracy for breadth." Report at 157. An enlargement of the Survey in the record shows the northeastern seawall of Liberty Island in the same location as it appears on a 1980 photomap of the Island that meets national accuracy standards, providing an accurate control point on the Survey. *Id.* Furthermore, the Special Master concluded that the location of two points on the Fort Gibson wall as they appear on the 1857 Survey match precisely with the location of those points on both the 1980 photomap and a 1995 survey of the Island accepted by New York as accurate. *Id.*

Moreover, New York's experts did not offer an alternative to the 1857 Survey. Report at 156. Although New York at one point indicated a preference for an 1837 map of the Island, the Special Master correctly concluded that that map "is simply not as detailed as the 1857 map" and "its accuracy is not buttressed by the 1980 [photo]map and 1995 survey."¹⁸ Report at 158. Nor did New York convince the

¹⁸ The various estimates offered by New York's experts regarding the size of Ellis Island to mean high water and mean low water as depicted on various maps are unreliable. The estimates, which appear at page 160 of the Report, were compiled by an individual identified by New York's experts as Sander Prisloe. T2940. New York's experts confessed a lack of knowledge concerning the accuracy of the equipment used by Mr. Prisloe, the methods he undertook, and whether his calculations were verified. In

Special Master that fill was added to Ellis Island in the period between 1834, when the boundary was established, and 1857, when the Survey was created. Thus, nothing in the record suggests that the Island's shape changed during that time. *Id.*

In light of New Jersey's strong evidence concerning the 1857 Survey, and New York's failure to rebut that evidence or to offer an alternative map, the Special Master was correct to conclude that the 1857 Survey is the best available depiction of Ellis Island in 1834. This Court has always used historical maps to determine interstate boundaries and has never declined to do so simply because such maps may not be as accurate as current maps. *See, e.g., Minnesota v. Wisconsin*, 252 U.S. 273, 278-79 (1920). Indeed, since this Court consistently has held that interstate boundaries must be determined on the basis of the conditions that existed at the time the boundaries were set, an available historical map must be selected to determine the boundaries of Ellis Island in 1834. *See, e.g., Illinois v. Kentucky*, 500 U.S. 380 (1991); *Ohio v. Kentucky*, 444 U.S. 335 (1980). New Jersey clearly has shown that the 1857 Survey is the most accurate and appropriate map to use.

Despite his findings concerning the accuracy of the 1857 Survey, the Special Master inconsistently rejects what he correctly terms "[t]he most obvious way to determine the shape and configuration of New York's sovereign territory": the placement of transparencies of the 1857 Survey and the 1980 photomap over the 1995 survey of the Island. Report at 162. By lining up control points on those documents such as the seawall on Liberty Island and the remaining Fort Gibson wall, the boundary of the original Island can be placed with precision on the 1995 survey. Delineation of the States'

fact, Dr. Swanson admitted that he was not even present for a portion of the time during which Mr. Prisloe worked and that many of Mr. Prisloe's calculations were discarded without being recorded. T3041-42. Mr. Prisloe was not offered as a witness by New York, having not been qualified as an expert in this action.

boundary in this fashion would be most effective and accurate. The Special Master, however, declines to adopt this simple, direct, and most accurate approach.

Instead, he attempts to address "impracticalities and inconveniences" that he speculates may result from adoption of the boundary defined in the 1834 Compact, even though there is no evidence in the record concerning any such difficulties. *Id.* For example, the Special Master accurately notes that the boundary depicted on the 1857 Survey would intersect a few buildings and would place a strip of New Jersey territory between the ferry landing slip and New York land under the Main Building. The Special Master claims that this "overly literal" approach would enclave New York and leave that State without access to or authority over land adjacent to its territory. *Id.* He also found that the boundary line established in the Compact would be "haphazard and uneven" and speculates that such a line might result in difficulties when applying workers' compensation and historic preservation laws on the Island. *Id.*

In order to alleviate these practical obstacles, the Special Master recommends alteration of the boundary established in the Compact and creation of an entirely new division of jurisdiction between the States on the Island. The Special Master's new boundary respects buildings presently existing on the Island, rather than the provisions of the 1834 Compact agreed to by the States and ratified by Congress. Under the Special Master's proposed remedy, New York's territory does not in any way resemble Ellis Island as depicted on the 1857 Survey. Instead, New York's portion of the Island will "roughly be a rectangle encompassing all of the Main Building . . . all of the land to the ferry slip directly in front of the Building, and the entire triangle-shaped area on the southeast side of Island Number One." Report at 166.

The practical concerns raised by the Special Master are not supported by evidence in the record. The Special

Master's fear that the boundary established in the Compact would leave New York without access to land over which it has jurisdiction and thus result in impracticalities and inconveniences is without foundation. Even under New York's theory of this case, Ellis Island is surrounded by New Jersey waters. Regardless of the extent of New York's jurisdiction on the Island, to get from New York's mainland to Ellis Island it is necessary first to travel through waters in New Jersey territory. This state of affairs has been present since 1834 without a single recorded instance of New Jersey's interference with the exercise of New York's "present jurisdiction." New York presented no witness, no document and no other evidence suggesting that New Jersey's exercise of its sovereignty over land located in front of the Main Building would in some way interfere with the exercise of New York's limited jurisdiction on the Island.

In addition, nothing in the record indicates that the boundary established in the Compact will be any more or less difficult to administer than the redesigned boundary drafted by the Special Master. Modern technology allows for the delineation of the boundary established in the Compact. Once set, the boundary will remain fixed and its contours will be known to the federal officials operating the various facilities on the Island. The fact that the line might be irregular does not mean that it will be difficult to identify with precision.

Moreover, nothing in the record suggests that preservation of the historic structures on the Island will be adversely affected by the boundary established in the Compact. The Main Building has already been preserved by the National Park Service, which consulted with both New York and New Jersey as required by federal law. See 16 U.S.C. §470a(b) (3)(1995); 36 C.F.R. §§800.1(c)(1)(i)(ii). The record contains no indication that this dual consultation caused any administrative difficulty or frustration of the goals of preservationists. Nor is there any evidentiary support for the proposition that New Jersey is any less interested in

preserving the historic buildings within its sovereign territory than is New York. Moreover, as noted by the Special Master, to the extent that New Jersey's preservation laws differ from those of New York, with which the preservationist *amici* presumably are more familiar, *amici* simply "must be more creative in asserting their members' interests under [New Jersey's] laws." Report at 164, n.67.

Importantly, in the *Collins* case, the National Park Service, which presently controls Ellis Island, took the position that split jurisdiction existed on the Island. The Park Service has never expressed any concern that split jurisdiction would interfere with its operations or its ability to access the Island. The federal government did not retreat from that position in this case and has expressed no concern with the prospect of dual jurisdiction.

Reconfiguration of an entire interstate boundary to address unproven and undefined practical difficulties and inconveniences contradicts this Court's historic allegiance to application of the exact contours of boundaries approved by States and ratified by Congress, regardless of unintended inconveniences and impracticalities that might result.

For example, in *Ohio, supra*, this Court adopted as the boundary between Ohio and Kentucky the low water mark on the north side of the Ohio River, as it existed in 1792. The Court was not discouraged from adoption of that line by either the difficulty of establishing the 1792 low water mark nor the potential inconveniences that might result from that boundary. The Court noted that difficulties in establishing the location of an old boundary "have not dissuaded the Court from concluding that locations specified many decades ago are proper and definitive boundaries." 444 U.S. at 340. Nor was the Court concerned that application of the boundary might result in the inconvenient circumstance of having a portion of one State on the "wrong" side of the river. *Id.*

A similar approach was taken in *Illinois, supra*, in which this Court found the boundary between those States also to be the low water mark of the Ohio River as it existed in 1792. Writing for the majority, Justice Souter noted that after application of the 1792 low water boundary, 15 structures extended into or over Kentucky's territory from the Illinois shoreline. 500 U.S. at 387. Apparently, the Court was satisfied that delineation of the proper boundary between the two States was of paramount concern, and any impracticalities or inconveniences resulting from the boundary would be left to the States to resolve. The same course should be followed in this instance.

Furthermore, this Court continuously has recognized that an interstate Compact must be enforced as written, and that any potential difficulties can and should be addressed by the States. See *Vermont v. New York*, 417 U.S. 270 (1974); *Wyoming v. Colorado*, 298 U.S. 573, 586 (1936). Indeed, as the Special Master recognized, "neither the Court nor its Special Master can draw boundaries that do not respect the boundaries set by the States themselves with congressional approval. Under principles of separation of powers, the congressional expression of state sovereign[ty] will control." Report at 150. Adherence to these principles requires the Court to interpret the Compact and define the boundary as determined by the States and Congress.

Additionally, acceptance of the Special Master's recommendation undoubtedly would invite claims in every boundary dispute before this Court concerning practical obstacles and inconveniences resulting from application of established boundaries. Requests for alteration of boundaries to address these problems, whether real or perceived, would necessitate the production of extended testimony and evidence concerning the practical application of interstate boundaries. This Court is not the proper forum for resolution of States' desires to change the terms of an interstate Compact. The 1834 Compact was negotiated by the States and ratified by

Congress. If the boundary created by the Compact proves to be inconvenient or impractical, then it is up to the States to address those issues between themselves, with the approval of Congress.¹⁹

POINT III

THE RECORD CONTAINS NO CREDIBLE EVIDENCE TO SUPPORT THE SPECIAL MASTER'S CONCLUSION THAT THE PIER ON ELLIS ISLAND IN 1834 WAS PARTIALLY BUILT ON LANDFILL.

The Special Master's finding that the pier on Ellis Island in 1834 was partially constructed on landfill is based entirely upon the speculative claims of New York's witness, Dr. Squires. Those claims are unsupported by evidence in the record and do not provide the basis necessary to deviate from the mean high water line depicted on the 1857 Survey.

The Special Master cites two bases for his conclusion that a portion of the 1834 pier was constructed on fill: (1) that the 1819 map of Ellis Island shows what the Special Master interprets as a filled area around a portion of the pier; and (2) Dr. Squires' speculation that the pier was used to carry ammunition by rail car, along with his guess that such ammunition would be heavy enough to require a pier built on

¹⁹ Notably, the Decree proposed by the Special Master is internally inconsistent. Paragraph 1 of the Decree states that New Jersey is declared sovereign over the landfilled portions of Ellis Island and that New York is enjoined from enforcing its laws or asserting sovereignty over that land. In addition, paragraph 2 of the proposed Decree recommends that the boundary between the States be established as set forth in the 1834 Compact. Report at 169-70. However, paragraph 3 of the proposed Decree recommends that the boundary be established as set forth in the designated survey, a recommendation that would make New York sovereign over significant landfilled portions of the Island, contrary to the prior findings of the Special Master and the provisions of the Compact. Supp. Report at 16-18.

landfill. Report at 158-159. The record does not contain evidence to support either of those conclusions.

None of the maps in evidence contain conclusive evidence of filling on Ellis Island prior to 1834. Thus, the conclusion by the Special Master that even a portion of the 1834 pier was constructed on fill is based upon speculation. While the 1819 map shows some accretion in the area of the pier, that accretion is not necessarily evidence of fill.²⁰ It is undisputed that in 1819, pilings placed under a pier built over open tidal waters were capable of trapping sediment and creating accretion in the area of the pier. T282-11 to -25; T299-4 to -7; T3020-20 to T3021-4; T3061-12 to T3062-5; P382(e); P382(g). Therefore, the evidence shows that it is possible that the pier was built on pilings. T3026-22 to T3027-10. In fact, New York's expert, Dr. Squires, admitted that in 1819 at least a portion of the pier then existing on Ellis Island could have been built on a dense field of pilings and not on landfill and accounted for the apparent areas of accretion on the 1819 map. T2928-19 to T2929-20; T3023-20 to -24; T3061-12 to T3062-5; P382(e). Furthermore, the size and shape of the pier changed from time to time in the period from 1819 to 1857, suggesting that the pier had been built on pilings and not fill. T297-3 to T298-19; T313-3 to -8; T338-23 to T339-16; T3046-7 to -20; T3053-24 to T3054-3; T3059-24 to T3060-2; P382(g); P382(f); P382(h1); P382(j).

Secondly, Dr. Squires' testimony that the 1834 pier was used to transport ammunition on rail cars and that the weight

²⁰ Although the Special Master refers to an 1839 chart as one of the bases for his conclusion that the 1834 pier was partially constructed on fill, Report at 158-59, the record does not contain such a chart. It appears that the Special Master intended to refer to the 1819 map of the Island, about which both States offered testimony concerning the question of whether the 1834 pier was built on fill. The 1819 map is the only map in evidence from the period prior to 1834 that shows what may be accretion near the pier. T282-11 to -25.

of such cargo would necessarily have required that the pier be built on fill is entirely unsupported by evidence. Nowhere in the record does there appear any convincing evidence with respect to the uses of the 1834 pier. Nor does the record contain proof regarding the weight of ammunition and carts used on the Island at that time. New York has failed to establish by a preponderance of evidence these facts, which may not, therefore, serve as the basis for the conclusion that a portion of the 1834 pier was constructed on fill.

Moreover, the precise calculation needed to determine whether a pier supported by piles could support a particular weight is outside of the field of expertise for which Dr. Squires was qualified. He is not an engineer and expressly admitted at trial that he lacked expertise sufficient to determine what engineering techniques are necessary to support a certain amount of weight on a pier. When asked if he could make such a calculation, he stated, "I would not make that determination myself. I'm not a licensed engineer." T2831-18 to T2832-25. Thus, his testimony concerning the purported need to build the 1834 pier on fill falls outside of his limited expertise and is wholly insufficient to support the Special Master's finding concerning the pier's construction.²¹

²¹ Even if this Court were to adopt the Special Master's conclusion that a portion of the 1834 pier was built on fill and should be included within the high water line of the 1834 Island, the Special Master incorrectly double counted the 1834 pier when determining the land area over which New York has jurisdiction. The Special Master estimates the area to the low water mark on the 1857 Survey to be 4.69 acres, adopting an estimate reached by New York's two experts. Report at 160. The Special Master subsequently adds 0.2 acres to account for one-half of the 1834 pier which he found to have been constructed on fill. Report at 161. New York's area was thus expanded to 4.89 acres. However, the 4.69 acre estimate proffered by New York's experts already included the portion of the pier New York contends was built on fill. T3061-6 to 3052-8. Thus, the addition of 0.2 acres to New York's estimate of the Island to mean low water was duplicative and resulted in an unjustified expansion of New York's area of jurisdiction.

CONCLUSION

For the reasons stated herein, New Jersey respectfully submits that the Court should determine that New York's jurisdiction on Ellis Island is limited to the portions of the Island above the mean high water line in 1834. Additionally, the Court should employ a "template" approach and declare the boundary between New Jersey and New York on Ellis Island to be the line of mean high water as depicted on the United States Coast Survey of 1857, and not include the pier existing on the Island in 1834.

Respectfully submitted,

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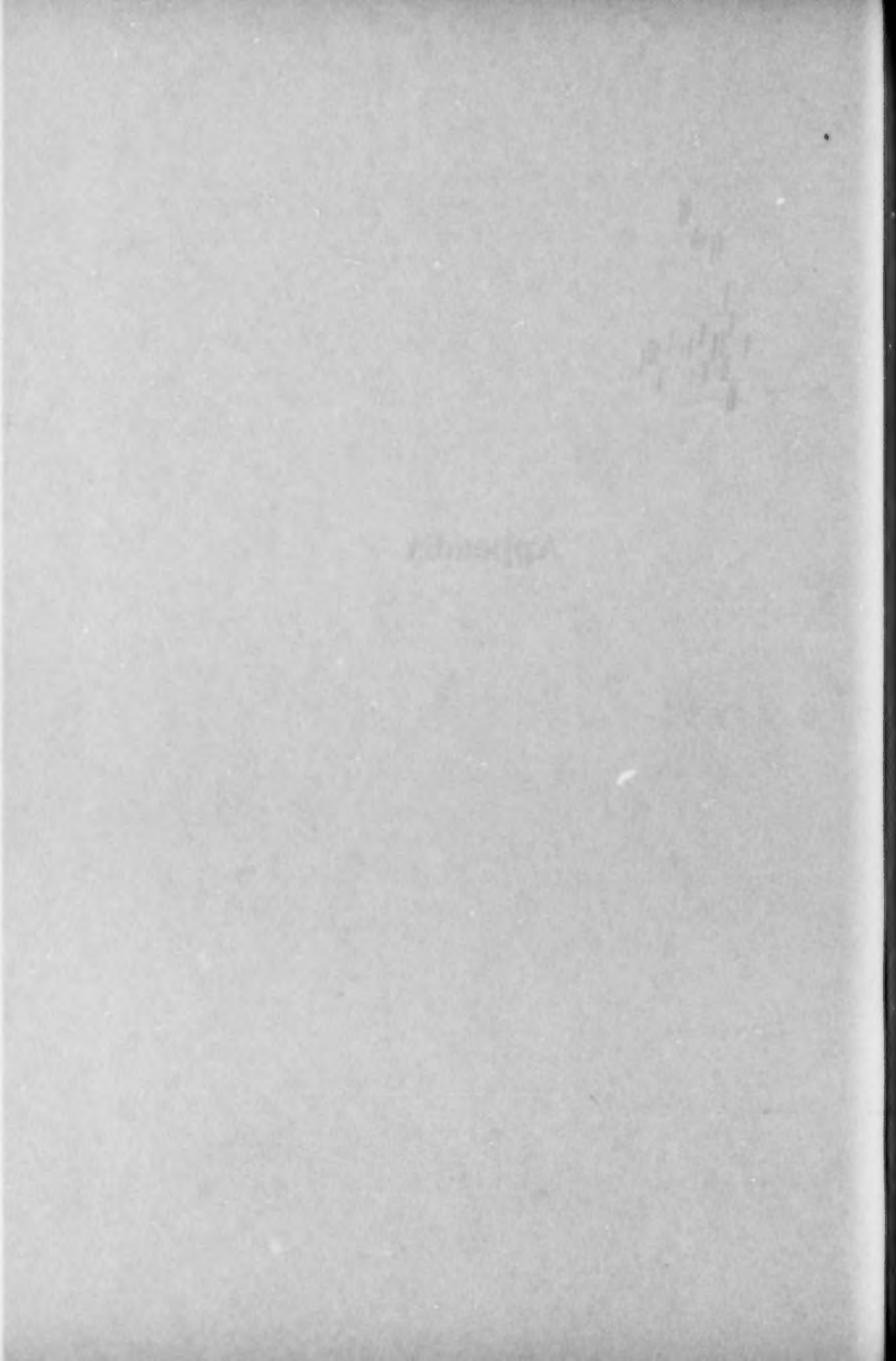
(609) 292-8567

Dated: July 31, 1997

Moreover, after the Special Master's reconfiguration of the boundary, the land over which New York has jurisdiction expands to 5.1 acres, almost twice the 2.74 acres depicted as within the mean high water line on the 1857 Survey.



Appendix



APPENDIX A

[Cession of jurisdiction over Ellis Island, bounded by waters of the Hudson River, by the State of New York to the United States of America, 1800.]

Act of February 15, 1800, c. 6 (Laws N.Y., 1797-1800, p. 454), entitled "An act to cede to the United States the jurisdiction of certain islands situate in and about the harbour of New York.":

Be it enacted by the People of the State of New York represented in Senate and Assembly, That the following islands, in and about the harbour of New York, and in and about the fortifying of which, this State hath heretofore expended or caused to be expended large sums of money, to wit, all that certain island called Bedlow's island, bounded on all sides by the waters of the Hudson River; all that certain island, called Oyster island, bounded on all sides by the waters of the Hudson river; and all that certain island called Governors island, on which Fort Jay is situate, bounded on all sides by the waters of the East river and Hudson river, shall hereafter be subject to the jurisdiction of the United States: Provided, that this cession shall not extend to prevent the execution of any process, civil or criminal, issuing under the authority of this State, but that such process may be served and executed on the said islands respectively, anything herein contained notwithstanding.

APPENDIX B

[Conveyance of title to Ellis Island to ordinary high water mark, by the State of New York to the United States of America, 1808.]

By Daniel D. Tompkins,
Governor of the State of New York.

WHEREAS by an Act of the Legislature of the State of New York entitled "An Act supplementary to an Act entitled 'an Act to cede the jurisdiction of certain land in this State to the United States', passed March 20th, 1807," it was in substance enacted and provided among other things that it should be lawful for the person administering the Government of this State to enter into and upon the lands called Ellis's or Oyster Island and to lay out and survey the same and having made such survey to contract and agree with the owner or owners of the said Island for the whole or for so much of the same and for any tenements therein being as the President of the United States should judge requisite for fortifications and to purchase the same in the name and behalf of the people of the State of New York but that if he could not agree with the owner or owners thereof respectively or in case the owner or owners thereof should be under age *non compos mentis* or out of the State that then it should be lawful for the person administering the Government of the said state to apply to the Chancellor thereof who upon such application was by the said act required to issue a writ or writs in nature of a writ *ad quod damnum* to be directed to the Sheriff of the City and County of New York commanding him to execute the same in the manner therein directed and required and that if upon the return of the said writ and upon an examination thereof by the Chancellor it should appear to have been duly executed then the said Chancellor was required to enter judgment that the people of this State (the person administering the Government first causing to be paid into the said Court the sum or sums of money assessed in the inquisition to be taken and made under and by virtue of the said writ over and

besides the costs) should be entitled to hold all and every the said tenements together with the rights and appurtenances in the said inquisition described as fully and effectually as if the same had been granted by the owner or owners thereof and that upon the title to the said land and tenements being vested in the people of the State of New York, as aforesaid, the person administering the Government of the said State was by the said act required and empowered to convey and grant all the right, title and interest of the said State to the United States for the purposes in the said Act expressed provided that the sum or sums so assessed and the costs were paid to the order of the person administering the Government of the said in part recited act reference being thereunto had may more fully and particularly appear.

And whereas under and pursuant to the said Act Daniel D. Tompkins the person administering the Government of the State of New York did enter upon the said lands called Ellis's or Oyster Island and cause such survey thereof to be made as by the said Act is required and afterwards to wit under the eighteenth day of April last did represent to the Honorable John Lansing Junior Chancellor of the State of New York that the President of the United States judged the whole of the said Island and the tenements thereon requisite for fortifications that he had caused such survey thereof as aforesaid to be made and that he could not contract or agree with the owner or owners of the said Island inasmuch as some of the said owners were under age others were out of the state and because there were adverse and conflicting claims to the said Island as by the said representation on file in the office of the Register of the said Court of Chancery reference being thereunto had will more particularly appear; and whereas such proceedings were thereupon afterwards had in the said Court of Chancery under and pursuant to the before in part recited Act that on the 18th day of June in the year one thousand eight hundred and eight (the person administering the Government of the State of New York having first paid into the said Court the sum of ten thousand dollars being the sum

of money assessed in the inquisition taken and made pursuant to the aforesaid Act over and besides the costs accrued in the premises) it was ordered, adjudged and decreed in and by the said Court of Chancery of the State of New York that the people of the said State should from thenceforth and forever thereafter have and hold the said lands and tenements with their appurtenances in the inquisition taken in the premises pursuant to the aforesaid act described that is to say the lands commonly known and called by the name of Ellis's or Oyster Island situate in the Bay of New York, surrounded on all sides by the said Bay which Island contains by estimation to ordinary high water mark two acres three rood and thirty-five perches as fully and effectually as if all the right, title and interest of the owner or owners thereof in and to the same had been granted by him, her or the to the people of the said State of New York as by the record of the proceedings, orders, judgments and decrees of the said Court of Chancery in the premises reference being therein had may more fully and particularly appear.

NOW BE IT KNOWN to all those to whom these presents shall come that the said sum of Ten Thousand Dollars in the inquisition aforesaid assessed and the costs in the premises amounting to one hundred and eighty three dollars and ten cents having been paid to my order by and on behalf of the United States pursuant to the before in part recited Act I Daniel D. Tompkins being the person administering the Government of the State of New York do by these presents in pursuance of the requisition and power mentioned in the said Act and in consideration of the premises aforesaid convey and grant all the right, title and interest of the State of New York in and to the lands, tenements and appurtenances above mentioned and described to the United States *to have and to hold the same for the purposes mentioned and expressed in the said above in part recited act.*

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the privy seal of the State of New York

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at the City of New York the thirtieth day of June in the year of our Lord one thousand eight hundred and eight and in the thirty-second year of the Independence of the United States.

SEAL.

Daniel D. Tompkins,

I approve of the form of the preceding conveyance. New York, 1st July, 1808.

Nathan Sanford, Atty. U.S.A.

APPENDIX C

[Correspondence for the purchase of under water lands, William H. Moody, Attorney General of the United States of America, to the New Jersey Board of Riparian Commissioners, 1904.]

DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

July 15, 1904

The Riparian Commission of New Jersey
Commercial Trust Building
Jersey City, N.J.

Sirs:

I have the honor to apply for a grant to the United States of such title as the State of New Jersey may have in the lands in New York Bay adjoining and surrounding Ellis Island included within the following area, that is to say:

Starting at a point in the center of the filled land near Ellis Island upon which the hospital of the Ellis Island immigrant station now stands, and which is marked upon the annexed map "New Island built 1896", with a radius of fifteen hundred (1500) feet describe a circle. (See map.)

This land is desired by the Government for use in connection with the immigrant station at Ellis Island.

Heretofore, it would seem, the General Government has proceeded upon the theory that the ownership of the lands under water around Ellis Island was in the State of New York. In 1800 New York ceded its jurisdiction over Ellis

Island to the United States; in 1808 it condemned the island and sold it to the United States; and in 1880 it granted to the United States its title and jurisdiction to and over the lands under water around Ellis Island within certain limits.

While there is no question as to the ownership and jurisdiction of New York of and over Ellis Island proper and its power to convey the same to the United States, it would seem from the boundary agreement between New York and New Jersey of September 16, 1833, that the ownership of the lands under water west of the middle of the Hudson River and of the Bay of New York is in the State of New Jersey.

By the act of June 28, 1834, c. 126 (4 Stat. 708, 711), Congress consented to that agreement, upon the condition "that nothing therein contained shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement."

In my opinion, Congress has the absolute right, in virtue of its constitutional power to regulate interstate and foreign commerce, to use the submerged lands in the navigable waters of the United States for any purpose incident to commerce or navigation, without the consent of the State in which such lands may be, and without making any compensation therefor to their owner, whether State or individual.

I am also of opinion that the Ellis Island immigrant station is properly to be classed as an instrument of commerce, and, therefore, that the use by the United States of the lands under water around the island for the purposes of that station is lawful and constitutional.

But to avoid any dispute about the matter, and in recognition of that principle of comity which should prevail between the State and Federal Governments and which is so vital to their successful and harmonious administration, a

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grant of such title as the State of New Jersey may have in the lands in question is deemed advisable and is accordingly solicited.

Respectfully,

/s/ Wm H Moody
Attorney General

APPENDIX D

[Deed for lands surrounding Ellis Island to the high water mark, from the State of New Jersey to the United States of America, 1904.]

NEW JERSEY BY RIP'N COMM'NRS GRANT DATE

TO

NOV'R 30th 1904

UNITED STATES OF AMERICA

THE STATE OF NEW JERSEY: TO ALL TO WHOM
THESE PRESENTS SHALL COME OR MAY CONCERN.

GREETING: WHEREAS Pursuant to an act of the Legislature of said State, approved February 10th, 1891, entitled "A further supplement to an act entitled 'An Act to ascertain the rights of the State and of Riparian owners in the lands lying under the waters of the Bay of New York and elsewhere in this State' approved April eleventh, one thousand eight hundred and sixty four," and other acts and joint resolutions of the legislature of said State, The United States of America, being the owner of lands comprising what is known as Ellis Island in the Bay of New York, County of Hudson and State of New Jersey, which lie above high water mark and in front of which the lands under water hereinafter described are situated, has applied to the Riparian Commissioners of said State for a grant of the said lands under water, and to have the said Commissioners fix the boundaries of the said lands under water, and determine the price or compensation to be paid to the said State therefor, and the terms and conditions of said grant.

And Whereas, the said Riparian Commissioners, to wit: Franklin Murphy, Governor, William Cloke, Robert Williams, M.F. McLaughlin and John R. Reynolds, having

due regard to the interests of navigation and the interests of the State, have agreed to grant the lands under water hereinafter mentioned upon the terms herein set forth, and have determined the sum of One Thousand Dollars (\$1,000) as the price or reasonable compensation to be paid to the State for the said lands.

Now Therefor, the said State of New Jersey, by the said Riparian Commissioners, the Governor approving, in the consideration of the premises, the terms and conditions hereinafter contained, and the said sum of One Thousand Dollars (\$1,000) paid in cash by the United States of America to the said State, the receipt whereof is hereby acknowledged, does hereby grant, sell and convey, unto the said The United States of America, all the right, title, claim and interest of every kind, of the State of New Jersey, in and to all that parcel of land, all of which was formerly and part of which is now flowed by the tide waters of New York Bay, in the County of Hudson and State of New Jersey, described as follows:

SEE RECORDED MAP IN MAP-ROOM

Beginning at a point in the Pierhead and Bulkhead Line established around Ellis Island, in the Upper Bay of New York, by the United States Government, September 12, 1904, and adopted October 26th, 1904, by the Commissioners appointed under the authority of the act entitled "An Act to ascertain the rights of the State and of Riparian owners in the lands lying under the waters of the bay of New York and elsewhere in this State," approved April 11th, A.D. 1864, and the supplements thereto; said point bearing north 15° west, two hundred and thirty (230) feet, from a fixed point or mark now situated in the northerly corner of existing crib or bulkhead of Ellis Island; thence, following said Pierhead and Bulkhead Line, south 53° west, one thousand eight hundred and sixty (1,860) feet to a point; thence, following said line, at right angles, south 37° east, one thousand one hundred and

twenty-five (1,125) feet to a point; thence, following said line, at right angles north 53° west, one thousand eight hundred and sixty (1,860) feet to a point; thence following said line, at right angles north 37° east, one thousand one hundred and twenty-five (1,125) feet to the point of beginning, making a parallelogram one thousand one hundred and twenty-five (1,125) feet by one thousand eight hundred and sixty (1,860) feet as shown upon the official map of the War Department marked "Pierhead and Bulkhead Lines for Ellis Island, New Jersey, New York Harbor, as recommended by the New York Harbor Line Board, June, 1890", said lines having being extended at various times, as indicated on said map, by the Secretary of War, the last extension having been made September 12, 1904. A plan showing the boundaries of said grant is attached hereto and made a part hereof.

Together with all and singular the hereditaments and appurtenances thereunto belonging. To have and to hold all and singular the above grantee and described lands under water and premises unto the said The United States of America, in fee simple, forever.

It is distinctly understood and agreed that by accepting the within grant The United States of America does not waive any rights or privileges which it would possess had not the same been accepted, and that no rights of the grantee of any kind whatsoever shall be prejudiced by such acceptance.

In Witness Whereof, The said Commissioners have hereunto respectively set their hands, and these presents have been signed by the Governor, and the Great Seal of the said State has been hereunto affixed and attested by the Secretary of State, this Thirtieth day of November in the year Nineteen hundred and four.

Franklin Murphy Governor
William Cloke

(State Seal)

Witness:

Robert Williams
M.F. McLaughlin
J.R. Reynolds
John C. Payne
S.D. Dickinson
Secy of State

STATE OF NEW JERSEY

COUNTY OF HUDSON SS: BE IT REMEMBERED,
That on this Twelfth day of December Nineteen hundred and
four, before me, the subscriber, a Master in Chancery of New
Jersey, personally appear John C. Payne, who, being by me
duly sworn on his oath, saith that he saw Franklin Murphy,
Governor, William Cloke, Robert Williams, M.F.
McLaughlin and John R. Reynolds, the within named
Commissioners, sign and deliver the within deed as their
voluntary act and that he, the said John C. Payne thereupon
subscribed his name as an attesting witness thereto.

Sworn and subscribed before me
at Jersey City the day and year
aforesaid

John C. Payne
George L. Record
Master in Chancery of New Jersey

Rec'd in the Office & Recorded December 23rd 1904
@10,18 A.M. No. 3189.

APPENDIX E

**[Cover and Page 9 of National Park Service publication
identifying landfilled portions of Ellis Island as part of the
State of New Jersey, 1980.]**

**ANALYSIS OF ALTERNATIVES
(ENVIRONMENTAL ASSESSMENT)
FOR THE GENERAL MANAGEMENT PLAN**

**STATUE OF LIBERTY NATIONAL MONUMENT
NEW YORK/NEW JERSEY**

Prepared by

**United States Department of the Interior/National Park
Service/Denver Service Center**

Approved for Distribution

/s/

**Richard L. Stanton,
Regional Director, North Atlantic Region**

REGIONAL SETTING

Liberty and Ellis islands are located in Upper New York Harbor, the entry to one of the largest urbanized regions in the world. The 27.5-acre Ellis Island lies about a mile west of the southern end of Manhattan, less than 1,200 feet from the bulkhead line of New Jersey's Liberty State Park. Liberty Island, about 12.5 acres, lies southwest of Ellis Island and a half mile east of the Jersey City bulkheads.

Both islands lie on the New Jersey side of the state line; however, all of Liberty Island and the original 3.5-acre portion of Ellis Island belong to the state of New York. The remainder of Ellis (24 acres created by landfill), the submerged lands, and the surrounding waters are part of the state of New Jersey.

Approximately 22 million people, or 10 percent of this nation's population, reside within a 1½-hour public transportation or automobile ride of the park. In addition, the 17 million national and international visitors who come to the New York City region each year can conveniently reach the park using public transportation facilities.

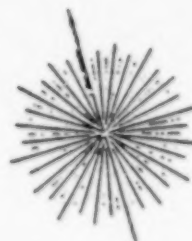


APPENDIX F

J-E-R-S-E-Y-C-I-T-Y

NEW JERSEY CENTRAL RAIL ROAD CO'S BOOKS

HUDSON RIV



In accordance with the Act of Congress U.S.A.
Washington D.C. March 3rd June 1890
The Board of Commissioners of the New York Harbor and River
has caused to be made a plan of the New York Harbor and River
as shown on the plan and as the same is now and was then
represented by the New York Harbor and River Board for the year

Wm. L. Abbott
Chas. E. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith



Pierhead and Bulkhead Lines
for
Ellis Island, New Jersey,
New York Harbor
as recommended by the
New York Harbor Line Board

appointed
for the establishment of the New York Harbor and River Board
under the Act of Congress U.S.A. Washington D.C.
Oct. 3, 1890, and the Act of Congress U.S.A. Washington D.C.
Oct. 3, 1890, and the Act of Congress U.S.A. Washington D.C.

June 1890

Scale 1:100,000

Approved

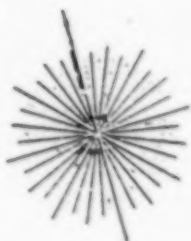
July 9, 1890

Wm. L. Abbott
Chas. E. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith

JERSEY CITY

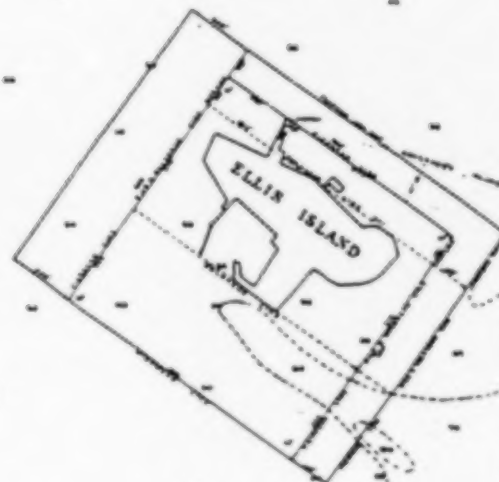
NEW JERSEY CENTRAL RAIL ROAD CO'S DOCKS

HUDSON RIV.



In conformity with the Act of Congress, U.S.A.,
Washington, D.C. March 3rd 1890.
The Board of Engineers and Surveyors of the New York Harbor and New York Harbor Line Board for the
purpose of the Act of Congress, U.S.A.,
March 3rd 1890.

Henry O. Elliot
Chas. E. Smith
Wm. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith
J. H. Smith



Pierhead and Bulkhead Lines
for
Ellis Island, New Jersey,
New York Harbor
as recommended by the
New York Harbor Line Board

approved
for the construction of the pierhead lines of New York Harbor and its adjacent
waters by General Order No. 10 of the Board of Engineers, U.S.A., Washington, D.C.
Oct. 1, 1890 in accordance with Section 14 of Act of August 2, 1882.

June 1890
Scale 1:10,000

Mr. Department

July 3, 1890.

Approved

Richard B. Root
Surveyor of the

Mr. Department

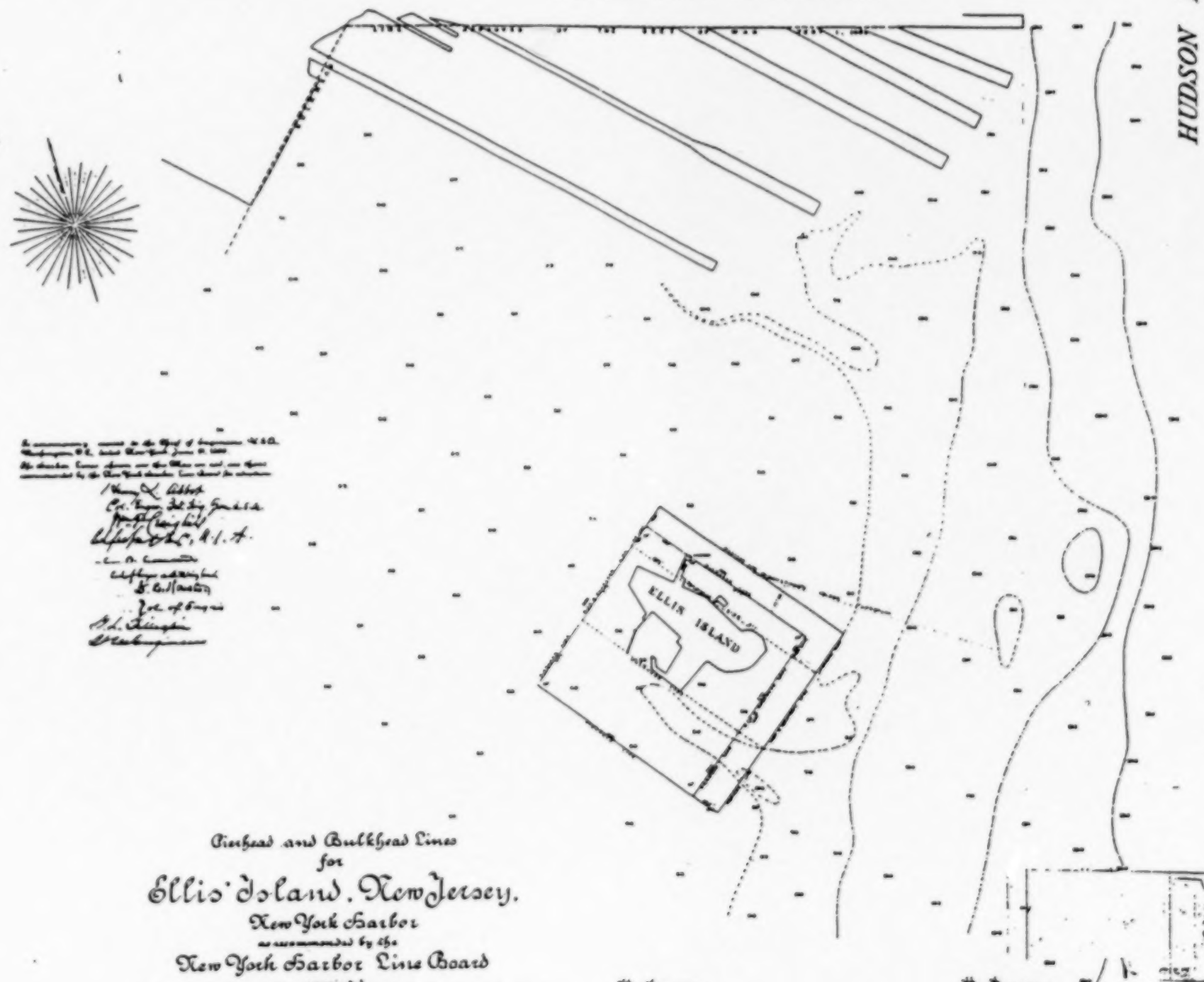
July 10, 1890.

The construction of the pierhead and bulkhead
lines shown on this map approved

J. H. B. Root
Surveyor of the

NEW JERSEY CENTRAL RAIL ROAD CO'S BOOKS

HUDSON RIV.



The accompanying report to the Chief of Engineers, U.S.A.,
Washington, D.C., dated New York, June 11, 1900.

Mary Q. Abbott
Ct. House St. by Jones &
Wells Building
Boston, Mass., U.S.A.
- C. A. Bennett
Capt. Abbott
St. Paul, Minn.
Vol. of Songs
S. H. Livingston
Washington

Steeplehead and Bulkhead Lines
for
Ellis Island, New Jersey,
New York Harbor
as recommended by the
New York Harbor Line Board

for the establishment of the disease cases of New York State and its adjacent waters by Samuel Cohen, Jr. 60 Old Cove, Poughkeepsie, N.Y. 12601. Washington, D.C. 20540 on September 2nd 1992.

- June 1890 -

Sample Name:

Not Reported

July 9, 1899.

—

Respectfully,
Sincerely,
Prof. [Signature]

Mar Department

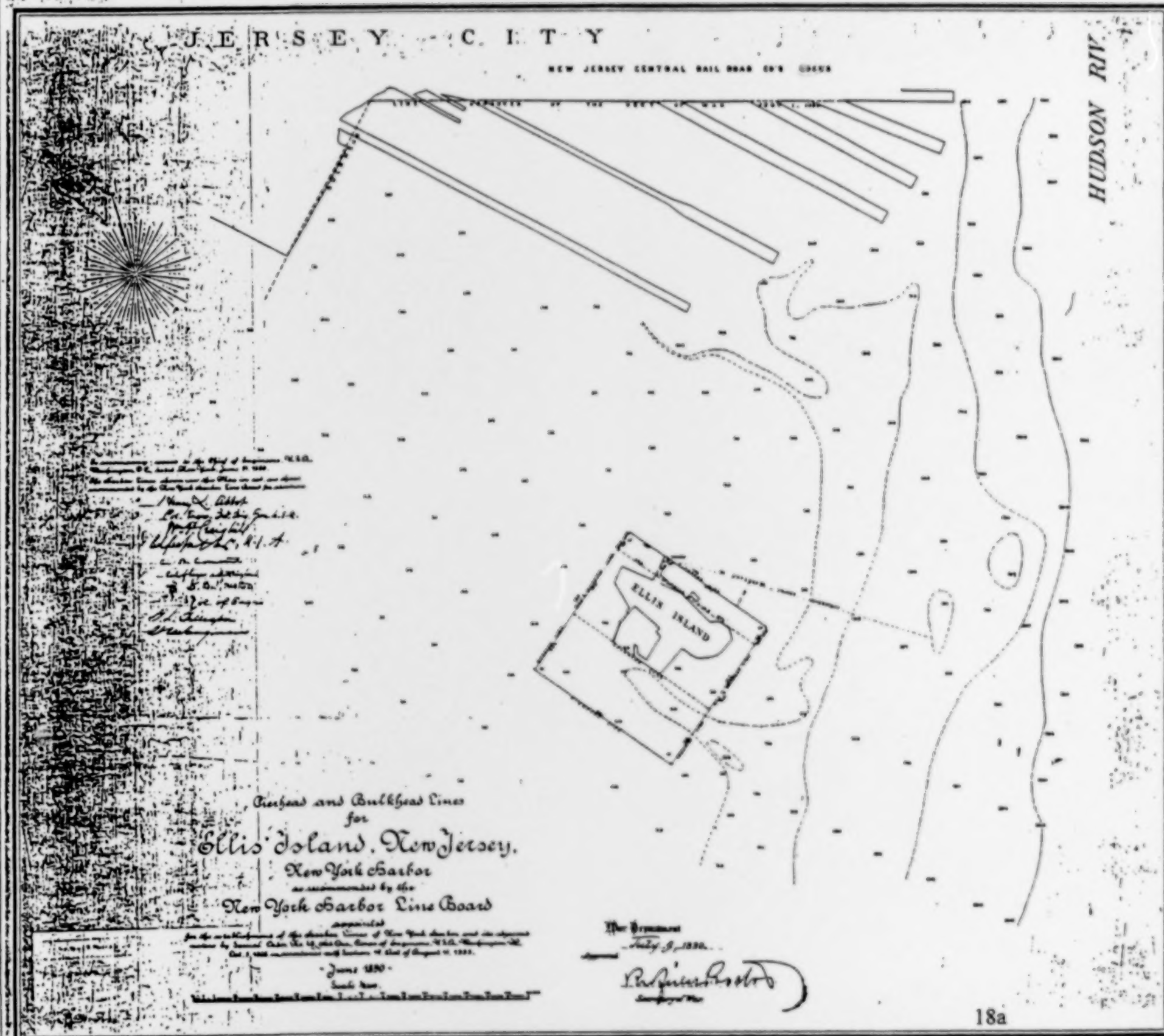
July 25th 1900

The undersigned of the National and Religious
League, above or below are approved.

Jeffrey A. Boer
Hunting away on

NEW JERSEY CENTRAL RAIL ROAD CO. 1960

WINSON PIR



Richhead and Bulthead Lines
 for
 Ellis Island, New Jersey.
 New York Harbor
 as recommended by the
 New York Harbor Line Board

For the acknowledgments of the American Consul at New York and his agents
written by Samuel Olin, Esq. of New York, dated at New York, August 11, 1823.

- June 1890 -
Sandy Bay.

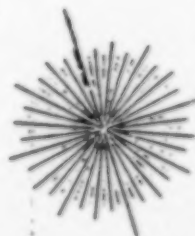
The Democrat
- July 9, 1890.

Respectfully

JERSEY CITY

NEW JERSEY CENTRAL RAIL ROAD CO'S Docks

HUDSON RIV.



As recommended by the Board of Engineers, U.S.C.
Washington D.C. August 10th 1890.
The above lines connect the New York and New Jersey
Harbors by the New York Harbor Line and the Hudson River Line.

Wm. L. Atter
Chas. E. Smith
J. H. Craig
J. H. Craig
J. H. Craig
J. H. Craig
J. H. Craig
J. H. Craig
J. H. Craig
J. H. Craig



Pierhead and Bulkhead Lines
for
Ellis Island, New Jersey,
New York Harbor
as recommended by the
New York Harbor Line Board

approved
for the establishment of the above lines of New York Harbor and its adjacent
waters by General Order No. 10 of the Board of Engineers, U.S.C., Washington D.C.
Oct. 1, 1890 and subsequent acts of Congress of August 11, 1892.

June 1890

Scale 1/2 inch = 1 mile

Published by the New York Harbor Line Board

New Department

July 9, 1890.

Approved

Wm. L. Atter

New Department

Feb. 10, 1890.

The establishment of the above lines and bulkhead
lines shown on this map approved

Wm. L. Atter

JERSEY CITY

NEW JERSEY CENTRAL RAIL ROAD CO'S DOCKS

HUDSON RIV.



As shown on the map of Engineer U.S.A.
Washington, D.C. dated August 10, 1890.
The above lines show the location of the
dockage for the New Jersey Central Railroad.

By Order of the Board of Engineers U.S.A.
Lieut. Col. G. B. Smith
Major J. B. Smith
Major J. B. Smith
Major J. B. Smith
Major J. B. Smith
Major J. B. Smith
Major J. B. Smith
Major J. B. Smith

ENGINEER OFFICE, U.S.A.
New York, N.Y. Aug. 10, 1890.
To accompany instrument to the Chief of Engineers, U.S.A.
of this date.

William Cullen
Lieut. Col., Corps of Engineers, U.S.A.

Pierhead and Bulkhead Lines
for
Ellis Island, New Jersey,
New York Harbor
as recommended by the
New York Harbor Line Board

approved
for the establishment of the harbor lines of New York Harbor and its adjacent
waters by General Order No. 10, dated Oct. 10, 1890, Corps of Engineers, U.S.A., Washington, D.C.
Oct. 1, 1890, in accordance with Section 14, Act of August 2, 1890.

June 1890

Scale 1/2 inch = 1 mile

Under the authority of the Chief of Engineers, U.S.A.

Wm. Cullen
July 9, 1890.

Wm. Cullen
Lieut. Col.

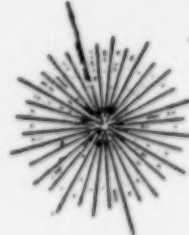
NOTE
Red Lines show the Pier and Bulkhead Lines approved by the City of New York, July 2, 1890.
Blue Lines show the Pier and Bulkhead Lines approved by the City of New York, July 2, 1890.
Black Lines show the Pier and Bulkhead Lines approved by the City of New York, July 2, 1890.
Green Lines show the Pier and Bulkhead Lines approved by the City of New York, July 2, 1890.
Yellow Lines show the Pier and Bulkhead Lines approved by the City of New York, July 2, 1890.

20a

JERSEY CITY

NEW JERSEY CENTRAL RAIL ROAD CO'S DOCKS

For Report
July 1, 1890.
 The modification recommended by the
 Harbor Line Board, and shown herein is
 known to approved.
Woodhull
 Secretary of War.



For Report
 The modification recommended by the
 Harbor Line Board, and shown herein is
 known to approved.
Woodhull
 Secretary of War.

UNIFICATION OF PIERHEAD AND BULKHEAD LINE AT
 ELLIS ISLAND, NEW YORK HARBOR.
 New York Harbor Line Board.
 New York N.Y. July 1st 1890.
 Sent to the Chief of Engineers, U.S.A., Washington D.C. with report of this date.
 The Harbor and Bulkhead Line shown on a 1/2 inch scale of the existing
 map of Ellis Island in the New York Harbor and New York Harbor
 Harbor Line Board, New York.

Henry M. White
 Chief of Engineers, U.S.A.
J. M. Barber
 Chief of Engineers, U.S.A.
J. L. Smith
 Chief of Engineers, U.S.A.
W. H. Rapp
 Chief of Engineers, U.S.A.
William H. Hill
 Chief of Engineers, U.S.A.

Pierhead and Bulkhead Lines
 for

Ellis Island, New Jersey,
 New York Harbor
 as recommended by the
 New York Harbor Line Board

for the unification of the harbor lines of New York Harbor and its adjacent
 waters by General Order No. 10, 1st Div. Corps of Engineers, U.S.A., Washington, D.C.
 Oct. 1, 1888 on construction and location of New York Harbor Line Board, New York.

June 1890

Scale 1/2 inch

For Report
 July 9, 1890.

W. H. Rapp
 Secretary of War.

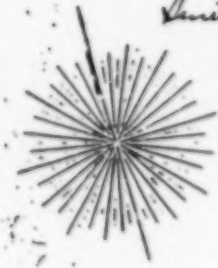
Line	Length	Width	Depth	Area
Line 1	100	10	10	1000
Line 2	100	10	10	1000
Line 3	100	10	10	1000
Line 4	100	10	10	1000
Line 5	100	10	10	1000
Line 6	100	10	10	1000
Line 7	100	10	10	1000
Line 8	100	10	10	1000
Line 9	100	10	10	1000
Line 10	100	10	10	1000

P-1000
1000
1000

JERSEY CITY

NEW JERSEY CENTRAL RAIL ROAD CO'S DOCKS

Mr. Department
July 1, 1907.
The modification recommended by the
Hudson River Board, and shown hereon as
broken is approved.
Ellis' Island
Secretary of War.



War Department
Sept. 1, 1909
The modification shown hereon in purple is approved.
Robert H. Smith
Adj. Secy of War.

War Department.
Feb. 7, 1911.
The modification of the pierhead and bulkhead line
on north corner of Ellis Id., shown hereon by broken
black line thus — — — — — is approved.
With this modification the bulkhead and pier-
head lines of Ellis Id on this date are as shown
by the lines shaded in blue.

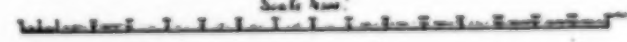
Robert H. Smith
Adj. Secy of War.

Recommendation made to the Chief of Engineers U.S.A.
Washington D.C. dated New York June 11, 1900.
The Board has approved the plan on and on the spot
recommended by the New York Harbor Line Board for adoption.
Wm. L. Abbott
Chief of Engineers U.S.A.
June 11, 1900.
C. D. Condit
Chief of Engineers U.S.A.
June 11, 1900.
John C. Smith
Chief of Engineers U.S.A.
June 11, 1900.

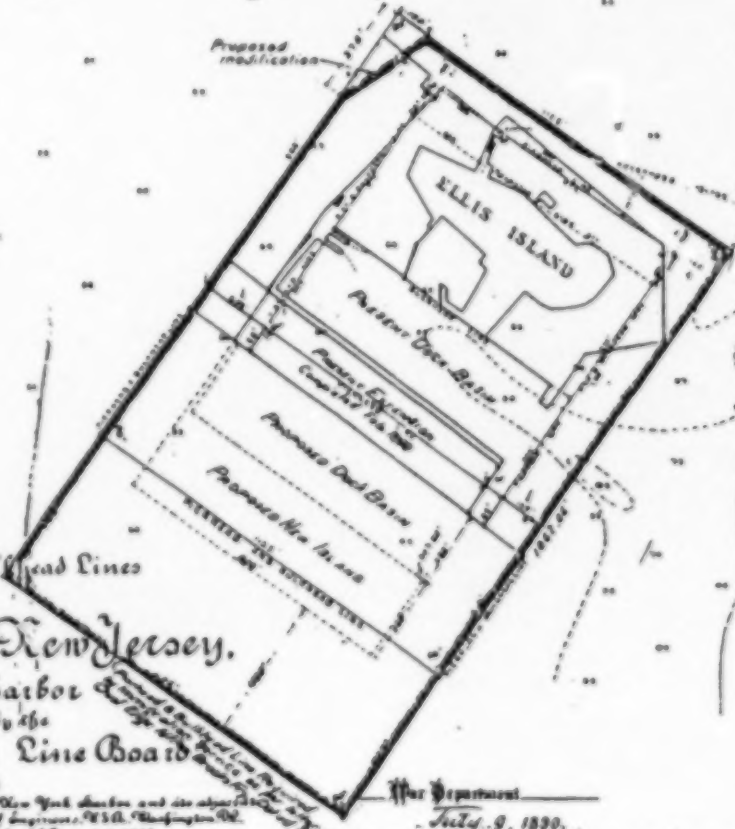
Pierhead and Bulkhead Lines
for
Ellis' Island, New Jersey.
New York Harbor
as recommended by the
New York Harbor Line Board
appointed

for the establishment of the Harbor Lines of New York Harbor and its adjacent
waters by Special Order No. 10, Chief of Engineers, U.S.A., Washington D.C.
Oct. 1, 1888 in accordance with Section 11, Act of August 11, 1848.

June 1890
Scale 1:50,000



Proposed modification

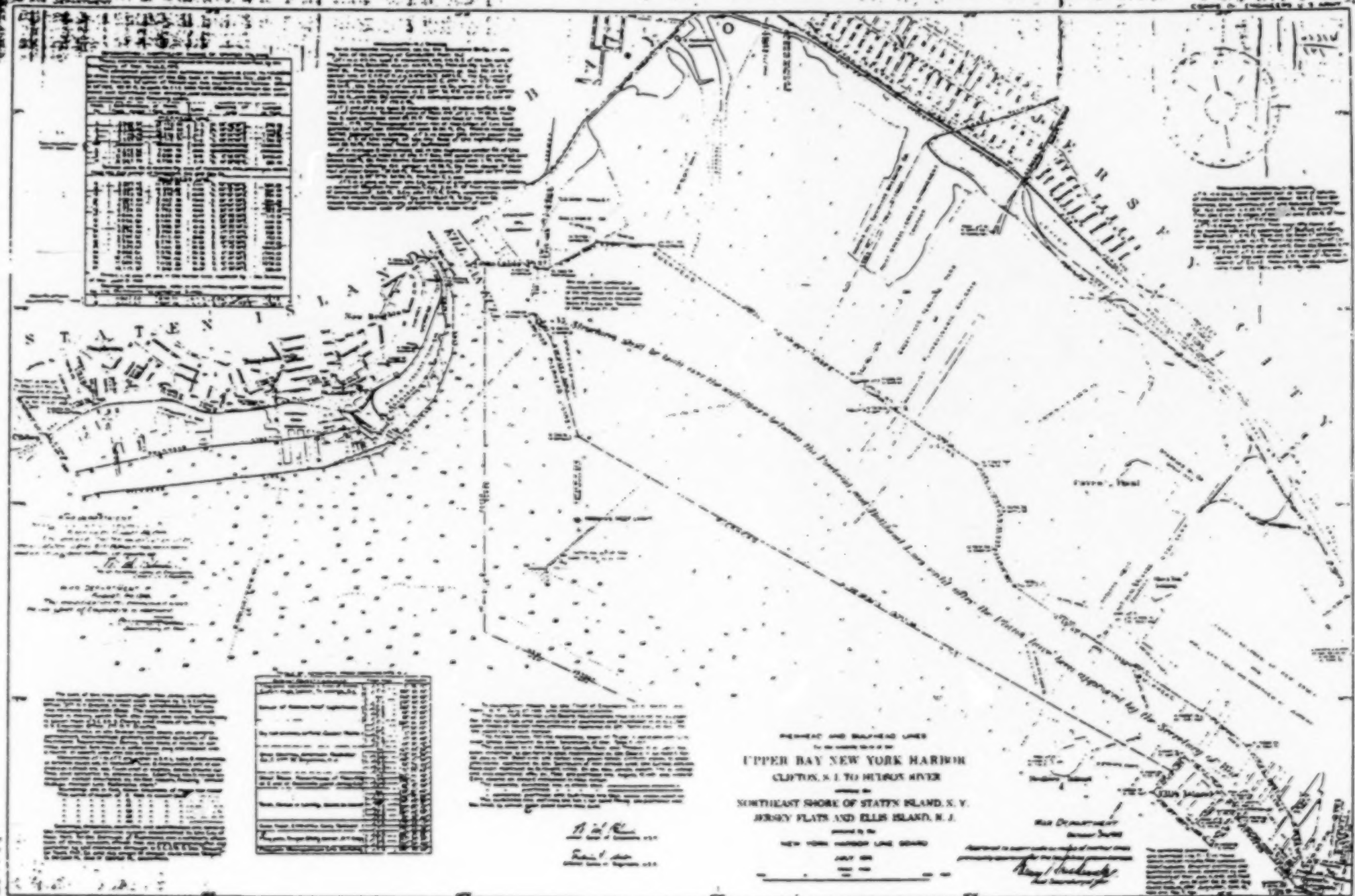


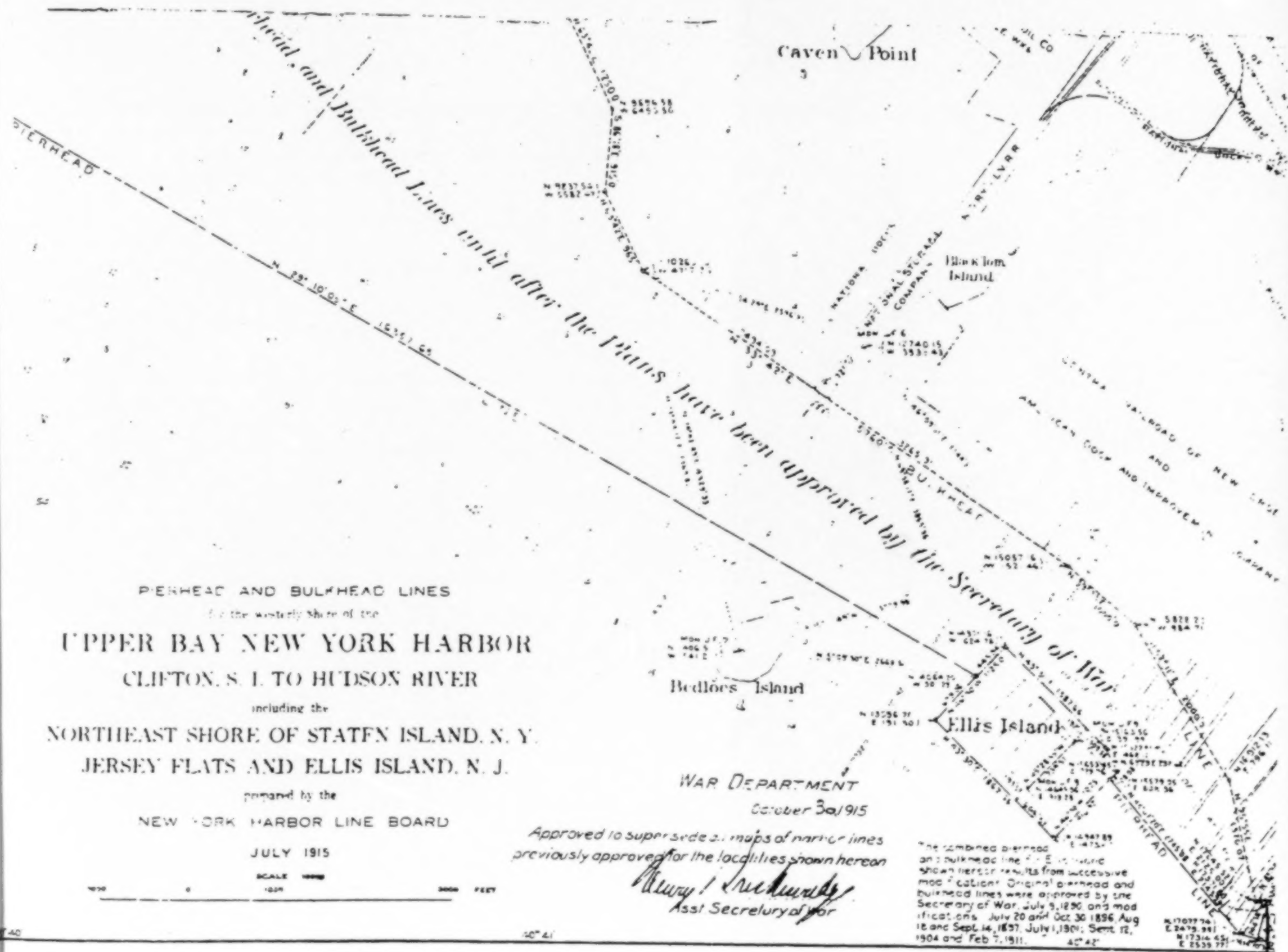
War Department
July 9, 1900.

Robert H. Smith
Adj. Secy of War.

Not shown when the Harbor Lines were established by the Act of July 9, 1890.
Ellis' Island
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APPENDIX G





PIERHEAD AND BULKHEAD LINES
for the western shore of the
UPPER BAY NEW YORK HARBOR
CLIFTON, S. I. TO HUDSON RIVER
including the
NORTHEAST SHORE OF STATEN ISLAND, N. Y.
JERSEY FLATS AND ELLIS ISLAND, N. J.

prepared by the
NEW YORK HARBOR LINE BOARD
JULY 1915

SCALE 1:1000
1070 0 3000 FEET

WAR DEPARTMENT
October 30, 1915

Approved to supersede all maps of harbor lines
previously approved for the localities shown hereon

Henry H. Richardson
Asst. Secretary of War

The combined pierhead
and bulkhead line for E. H. H. H.
shown hereon results from successive
modifications. Original pierhead and
bulkhead lines were approved by the
Secretary of War, July 9, 1896 and mod-
ifications, July 20 and Oct 30 1896, Aug
18 and Sept 14, 1897, July 1, 1901, Sept 12,
1904 and Feb 7, 1911.

N 17077 741
E 2479 941
N 17314 451
E 2535 771

PIER & BULKHEAD LINES, UPPER BAY, N. Y. HARBO



APPENDIX H

[Relinquishment of title and jurisdiction over lands covered with water and contiguous to lands of the United States at Ellis Island, by the State of New York to the United States of America, 1880.]

LAWS OF NEW YORK.

ONE HUNDRED AND THIRD SESSION.

CHAP. 196

AN ACT relinquishing title and jurisdiction to the United States over certain lands covered with water in the harbor of New York at Governor's, Bedloe's, Ellis' and David's Islands, and Forts Lafayette, Hamilton, Wadsworth and Schuyler.

PASSED May 7, 1880; by
a two-third vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All the right and title of the State of New York to the following described parcels of land covered with water, adjacent and contiguous to the lands of the United States, in the harbor of New York, at Governor's, Bedloe's, Ellis' and David's Islands, and Forts Lafayette, Hamilton, Wadsworth (or Tompkins), and Schuyler, and jurisdiction over the same are hereby released and ceded to the United States under article one, section eight, paragraph seventeen of the constitution, for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances. Said lands covered with water are bounded and described as follows:

* * *

AT ELLIS' ISLAND.

Beginning at a point fifty feet from the head of the east dock and on a line with the north face of said dock; running thence south eighteen degrees thirty minutes east for six hundred and five feet; thence south seventy-one degrees thirty minutes west for two hundred and two feet; thence north eighty-one degrees nineteen minutes west for three hundred and thirteen feet; thence north thirty-two degrees four minutes west for one hundred and seventy-eight feet, this line being parallel to the head of the west dock, and distant fifty feet from said dock; thence due north for five hundred and seventy-seven feet; thence south seventy degrees forty-seven minutes east for four hundred and twenty-four feet to the point of beginning.

* * *

§2. The commissioners of the land office are hereby authorized and directed to issue a patent of said released lands to the United States.

§3. This act shall take effect immediately.



8

Supreme Court, U.S.
FILED
JUL 31 1997
CLERK

No. 120, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE IN SUPPORT OF THE
EXCEPTIONS OF THE STATE OF NEW
YORK AND BRIEF OF AMICI CURIAE**

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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**MOTION OF NEW YORK LANDMARKS
CONSERVANCY, PRESERVATION
LEAGUE OF NEW YORK STATE, AND
HISTORIC DISTRICTS COUNCIL FOR
LEAVE TO FILE BRIEF AS *AMICI CURIAE***

Pursuant to Rule 37 of the Rules of this Court, the New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council (collectively, "Proposed New York Landmarks Amici" or "Proposed Amici") respectfully move for leave to file the accompanying brief as *amici curiae* in support of the State of New York's Exceptions to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R."). The State of New York has consented to the filing of this Brief. The consent of the State of New Jersey has been requested and refused.

The Proposed New York Landmarks Amici are local and state organizations dedicated to historic preservation. This

action, and the result recommended by the Special Master in the Report, raises the question of whether Ellis Island's historic structures are properly subject to the well-established and consistently-enforced historic preservation regulations of New York City or the less protective regulations of Jersey City, New Jersey. As organizations that have for years fought to safeguard the landmarks of New York State and City, the Proposed Amici have a demonstrable interest in the answer to this question.

Ellis Island, the gateway to this nation for millions of Americans, is an irreplaceable part of New York's cultural heritage. It was originally a part of New York, and, Proposed Amici believe, the Compact's drafters intended for it to remain a part of New York. The Report's conclusions to the contrary are unsupported by the plain meaning of the Compact, contemporaneous construction of its terms, the record in this case, and relevant precedent. Its recommendations must consequently be rejected.

The Proposed Amici possess a unique store of knowledge about historic preservation generally and the history of the New York City region in particular:

NEW YORK LANDMARKS CONSERVANCY

The New York Landmarks Conservancy is a not-for-profit civic organization chartered by New York State. It is dedicated to the preservation of structures of architectural, cultural and historic significance as well as to the designation and revitalization of historic districts. The Conservancy furthers these objectives by making grants and loans, and providing technical assistance, holding workshops, distributing publications, and sponsoring restoration and rehabilitation projects. The Conservancy is an experienced advocate for sound policies that encourage preservation as an integral part of urban planning. In this capacity, the Conservancy testifies frequently before the New York City Council, Board of

Standards and Appeals, City Planning Commission and Landmarks Preservation Commission on issues pertaining to historic preservation.

PRESERVATION LEAGUE OF NEW YORK STATE

The Preservation League of New York State is a New York not-for-profit corporation. Its mission is to protect and enhance historic values and property in the State of New York. Its 2,000 members throughout the state are concerned with the application and interpretation of preservation laws as well as environmental laws that impact upon historic resources. The League offers advice to hundreds of citizens every year who are concerned about the fate of historic properties in their region. It also maintains grant programs to assist in the rehabilitation and use of historic properties. The League has appeared as *amicus curiae* in numerous cases, such as the present one, concerning New York's landmarks preservation laws.

HISTORIC DISTRICTS COUNCIL

The Historic Districts Council is the citywide voice for New York City's 66 designated historic districts and for other neighborhoods meriting preservation. The Council's mission, to promote preservation awareness and involvement among New Yorkers, is implemented through a program of education, conferences, publications, and technical assistance. The Council's 28-member Board of Directors includes representatives from all five boroughs, 19 historic neighborhoods and three county-wide organizations, as well as from the design, planning and legal professions. The Council is the only grassroots association in New York City singularly dedicated to historic districts and the landmarks preservation laws that protect them.

The Proposed Amici participated at trial and in summary judgment and post-trial briefing before the Special Master.¹ Having now reviewed the Report, the record, and the applicable statutes and case law, the Proposed Amici believe that the Report should be rejected for at least two reasons. *First*, the Report incorrectly equates "property," as used in Article III, with "sovereignty," a term which appears nowhere in the Compact. No court or commentator at the time of the Compact would have found "sovereignty" in a mere "right of property." And it was for "property" rights, and "property" rights alone, that New Jersey settled in the Compact. This Court should not hold otherwise.

Second—and in the alternative—even if Article III did not give New York "sovereign" jurisdiction to the low water mark on the New Jersey shore, *at the very least* it gave New York "police power" jurisdiction over the same area. The Report's failure to address this issue is of particular significance to the Proposed Amici because what the Report acknowledges to be New York's "police jurisdiction" on the New Jersey side of the Article I boundary line is, in Proposed Amici's view, enough to give New York jurisdiction over, *inter alia*, "historic preservation" matters on the New Jersey side of the boundary. However, all indications are that New Jersey would think otherwise. Thus, the Court must fill this gap in the Report's conclusions, by affirmatively determining that New York has, *at the very least*, "police power" jurisdiction over the landfilled portions of Ellis Island.

The Proposed Amici are in a unique position to provide the Court with incisive views on these issues. The Proposed

¹ The amicus group in which the Proposed New York Landmarks Amici participated below also included the National Trust for Historic Preservation in the United States and the Municipal Art Society of New York. The latter of these organizations is filing a separate Brief in support of New York's Exceptions, in which Proposed Amici herein elected not to join because of their desire to address the distinct issues raised by the Report outlined in the accompanying Brief.

Amici possess a unique store of knowledge about historic preservation generally and the history of New York City and Ellis Island in particular. Their experience in the area of historic preservation should be helpful (in combination with the views of Proposed Preservation Amici) in the full presentation to the Court of the novel issues raised by this action. Their access to scholars familiar with and research materials concerning New York City history give them the resources to subject the Report's premises and conclusions to searching analysis. In an original case of this type, where the Court's mandate is to not reach any decisions of necessarily far-reaching import before exhausting all valid avenues of inquiry, the participation of the Proposed Amici will, consistent with Supreme Court Rule 37.1, be of "considerable help" to the Court's review of the Report while allowing the Proposed Amici to fulfill their mission of speaking out forcefully to safeguard New York's landmarks, including the historic structures of Ellis Island.

WHEREFORE, the Proposed New York Landmarks Amici respectfully move this Court that leave be granted to file the annexed brief as *amici curiae*.

Dated: New York, New York
July 30, 1997

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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE
EXCEPTIONS OF THE STATE OF NEW YORK**

The New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council (collectively, the "New York Landmarks Amici") submit this brief, as *amici curiae*, in support of the Exceptions of the State of New York to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R.").

INTEREST OF *AMICI CURIAE*¹

The New York Landmarks Amici are local and state organizations dedicated to historic preservation. This action concerns whether the State of New York or the State of New Jersey has "sovereign" jurisdiction over Ellis Island. The dispute turns on the interpretation of the terms of a compact entered into between New York and New Jersey in 1834 concerning their Hudson River/New York Harbor boundary (the "Compact"), and the course of conduct of the two states with regard to this boundary in the ensuing century and a half.

¹ Pursuant to Rule 37.6 of this Court, the New York Landmarks Amici state that this Brief was authored entirely by counsel for the Amici, and no person or entity other than the Amici and their counsel made a monetary contribution to the preparation of this Brief.

More importantly, however, this action, and the result recommended by the Special Master in the Report, raise the question of whether Ellis Island's historic structures are properly subject to the well-established and consistently-enforced historic preservation regulations of New York City or the less protective regulations of Jersey City, New Jersey.

As organizations that have for years fought to safeguard the landmarks of New York State and City, the New York Landmarks Amici have a demonstrable interest in the answer to this question. Ellis Island, the gateway to this nation for millions of Americans, is an irreplaceable part of New York's cultural heritage. It was originally a part of New York, and, Amici believe, the Compact's drafters intended for it to remain a part of New York. The Report's conclusions to the contrary are unsupported by the plain meaning of the Compact, contemporaneous construction of its terms, the record in this case, or relevant precedent. Its recommendations consequently must be rejected.

The New York Landmarks Amici possess a unique store of knowledge about historic preservation generally and the history of the New York City region in particular. Their experience in the area of historic preservation and local history will be helpful in the full presentation to the Court of the issues raised in this action. Their access to scholars familiar with and resources relevant to the history of the period will ensure that all factors of consequence are considered by the Court in assessing the Report's recommendations.

SUMMARY OF ARGUMENT

Article II of the Compact dictates, as New York ably argues, that New York has the "jurisdiction" of a "sovereign" over both the original and the landfilled portions of Ellis Island. Quite simply, Article II bestowed on New York jurisdiction that was coterminous with the entity of "Ellis Island" no matter how its physical boundaries might change

over time. It is on this basis, and this basis alone, that this case should be decided as a matter of compact construction. If the Court thinks otherwise, however, and deems it necessary to address Articles I and III of the Compact, it cannot do so on the basis of the Report's conclusions, for two alternative reasons.

First, the Report incorrectly equates "property," as used in Article III, with "sovereignty," a term which appears nowhere in the Compact. Notwithstanding Justice Holmes' dictum to the contrary in *Central Railroad Co. v. Jersey City*, 209 U.S. 473 (1908), no court or commentator at the time of the Compact would have found "sovereignty" in a mere "right of property," especially where, as was the case in Article III, the right at issue was no more than what the 1833 Commissioners would have understood as a *jus privatum* entitlement that had been expressly stripped of any *jus publicum* obligations or *jus regium* powers. Thus, while the Commissioners and their contemporaries may or may not have considered "jurisdiction" as always synonymous with "sovereignty," the Commissioners would never have equated "property" with "sovereignty." And it was for "property" rights, and "property" rights alone, that New Jersey settled in the Compact.

Second—and in the alternative—even if Article III did not give New York "sovereign" jurisdiction to the low water mark on the New Jersey shore, *at the very least* it gave New York "police power" jurisdiction over the same area. The Report, which confines itself to the "sovereign" effect of the Article I boundary line, never reaches this issue. It makes no attempt to define the scope of New York's residual (and facially "exclusive") jurisdiction on the New Jersey side of that boundary under Article III. The Special Master several times alludes to this jurisdiction as "limited," "legal," and, most significantly, as "police" jurisdiction. But the Report makes no effort to further circumscribe it, or determine its relationship to New Jersey's purportedly "sovereign" powers

over the waters and underwater lands in the vicinity of Ellis Island.

This omission is of particular significance to the New York Landmarks Amici because what the Report acknowledges to be New York's "police jurisdiction" on the New Jersey side of the Article I boundary line is, in the Amici's view, enough to give New York jurisdiction over, *inter alia*, planning, development and historic preservation matters on the New Jersey side of the boundary. All indications are, however, that New Jersey would not agree with this view of the scope of New York's residual powers. Hence, the Report's proffer of the Article I boundary as a full resolution of the dispute is far from such a full resolution. The Court must fill this gap in the Report's conclusions by affirmatively determining that New York has, *at the very least*, "police power" jurisdiction over the landfilled portions of Ellis Island.

POINT I

THE REPORT'S EQUATION OF "PROPERTY" AND "SOVEREIGNTY" IS WHOLLY UNTENABLE

This case should be decided, as a matter of compact interpretation, on the basis of Article II, and Article II alone. However, if the Court concludes otherwise and deems it necessary to examine Article III, it cannot adopt the Report's Article III conclusions because the equation of "property" and "sovereignty," on which the Report's Article III analysis is based, is wholly untenable. Article III granted to New York an "exclusive right of jurisdiction" over all the waters and the lands covered by such waters on the western side of the Hudson. New Jersey, by contrast, was granted only an "exclusive right of property" in the same subaqueous land, and it relinquished this ownership interest when it sold the landfilled areas to the Federal Government in 1904. If either of these rights can properly be equated with "sovereignty," it

is—as the State and City of New York argued before the Special Master—New York's "exclusive right of jurisdiction."

However, regardless of whether this Court is willing to equate "jurisdiction" with "sovereignty," there is no basis whatsoever for the Court to accept the Report's equation of New Jersey's "right of property" in the underwater lands around Ellis Island and "sovereignty" over those underwater lands. The plain meaning of Article III, which expressly distinguishes between all-inclusive "jurisdictional" and more limited "property" rights, does not permit such an equation. *See* Brief of Preservation Amici dated Mar. 25, 1996 (Docket No. 256). Nor—as Amici show below—would courts or commentators at the time of the Compact have found "sovereignty" in a mere "right of property," especially where, as was the case in Article III, the right at issue was no more than what the 1833 Commissioners would have understood as a *jus privatum* entitlement in underwater lands that had been expressly stripped of any *jus publicum* obligations or *jus regium* powers. This Court should not hold otherwise.

**A. ARTICLE III GRANTED TO NEW JERSEY
ONLY *JUS PRIVATUM* RIGHTS IN THE
UNDERWATER LANDS ON THE WESTERN
SIDE OF THE HUDSON RIVER**

Essential to understanding the nature of the "exclusive right of property" granted to New Jersey by Article III is a more general understanding of the meaning "rights of property" in "underwater lands" had for the Commissioners and their contemporaries in the 1820s and 1830s. The most compelling evidence of the meaning such terms had in this period is to be found in the language of the debate concerning rights in lands under navigable waters that was ignited by the New Jersey Supreme Court's 1821 decision in *Arnold v. Mundy*, 6 N.J.L. 1 (1821), and not resolved until this Court's decision in *Martin v. Waddel*, 41 U.S. 367 (1842). That

debate, which involved conflicting claims of title to the underwater lands in New Jersey's Raritan Bay, was well-known to Commissioners from New York and New Jersey who drafted the Compact, and necessarily affected their understanding of the "right of property" that Article III granted to New Jersey.

For many years prior to 1821, the Board of Proprietors of East Jersey had claimed title to all lands under water in the northern half of New Jersey. The Proprietors were among the successors in interest to Lord Berkeley and Sir George Carteret, the original grantees of what is now New Jersey, and purported to derive title to these underwater lands from Berkeley's and Carteret's 1664 grant from the Duke of York, which included, *inter alia*, "all rivers, harbours, waters, fishings, &c." in New Jersey. *Arnold*, 6 N.J.L. at 70. That grant had originally conferred both "soil" and "self-government" (*i.e.*, "property" and "jurisdiction") on Berkeley and Carteret, and thus on the Proprietors as their successors. *Id.* at 19. In 1702, however, the Proprietors—who had encountered difficulties governing the colony—ceded all rights of "government" back to the Crown, while purporting to retain their property rights in all the previously granted lands, including, the Proprietors believed, those lying under the navigable waters of the State. *Id.* at 27-29.

In 1821, however, the New Jersey Supreme Court held in *Arnold v. Mundy* that the lands under New Jersey's navigable waters belonged not to the Proprietors but to the State. The *Arnold* court concluded that such underwater lands, which in England had traditionally been the property of the Crown, had belonged to the Proprietors when they served as both the property holders and government of New Jersey, but had been ceded back to the Crown, as part of the *jura regalia*, in 1702. The State had succeeded to those rights after the Revolution, and consequently held the same

rights in the underwater lands that the King had held in such lands in England.

The State's authority over these lands, like those of the Crown, had three distinct aspects. It held the lands in fee simple (*jus privatum*), like any other individual, and could, arguably, make use of the lands as it desired. However, it could only make such use of the lands subject to the rights of the public (*jus publicum*) to use the waters above these lands for navigation and fishing. See Stuart A. Moore, *History of the Foreshore* 185-211 (1888). The *jus publicum* obligations with respect to the underwater lands "passed to the [State] as one of the royalties incident to the power of government," and it required the State to hold the lands as a "public trust for the benefit of the whole community" and to enforce this "public trust" through the use of its *jus regium* or sovereign regulatory powers. *Martin*, 41 U.S. at 413; *Arnold*, 6 N.J.L. at 77-78. As a result, the *Arnold* court concluded, such lands could not be sold or otherwise alienated by the State because the "sovereign power . . . cannot, consistently with the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common rights." *Arnold*, 6 N.J.L. at 78; see also *Martin*, 41 U.S. at 413; *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823); *Bell v. Gough*, 23 N.J.L. 624, 655-57 (1852); see generally *Idaho v. Coeur d'Alene Tribe*, No. 94-1474, 1997 WL 338603, at *17 (U.S. June 23, 1997); Richard D. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

Fearful of being compelled to forfeit interests in valuable underwater lands, the Proprietors contested the outcome in the *Arnold* case. The Proprietors accepted the view that the lands they claimed came encumbered with *jus publicum* obligations, but argued that the fee simple interest in such underwater lands could have been conveyed to the

Proprietors separate and apart from the *jura regalia* of government power. The *jus privatum* right of property, the Proprietors contended, could plainly be granted without *jus regium* powers to enforce the *jus publicum* trust in such lands. To make this argument, the Proprietors solicited opinions in 1824 from several prominent attorneys and jurists including Chancellor James Kent of New York and future New York Commissioner Peter Augustus Jay.

The opinions rendered on behalf of the Proprietors tell us much about contemporary understandings of property rights in "underwater lands." Most importantly, these opinions make clear that the "right of property" in lands under navigable waters was viewed by many (including at least one of the 1833 Commissioners) as independent of and wholly "unconnected with attributes of political power." In the words of Chancellor Kent:

The right of ownership of the soil in the navigable waters is not per se, an incident to sovereignty. It is not within the essential powers of government, because it is a right entirely subordinate to the jus publicum. It is not in the sense of the best English jurists, nor is it in the sense and practice of mankind, an incident and inseparable from royalty; and I am clearly convinced in my own mind . . . that the Proprietors of East Jersey were seized of the soil, and had a legal title to the land under tide waters at the time of their surrender of their powers of government to Queen Ann.

James Kent, *Opinion By Chancellor Kent of New York* (Dec. 16, 1824), reprinted in *East Jersey Proprietary Titles: Abstract of Title and Opinions of Chancellor Kent and E. Van Arsdale* 11 (1881) (emphasis added).

In his opinion, Peter Augustus Jay, the future New York Commissioner, was even more adamant in insisting that

"sovereign" and "proprietary" rights in underwater lands could be segregated:

It is proper to distinguish between the fee simple of the soil, and a right to exclusive use of it for all purposes. An individual may be seized in fee of the soil of a highway, yet the public have a right of passage over it; so the title to the soil of a fresh water river may be in one, and the right of fishing it in another. Almost all the arguments in [*Arnold v. Mundy*] tend to shew that use of navigable waters for various purposes is common to the public, but are inapplicable, (as it appears to me,) to the question in whom the fee simple of the soil is vested.

Id. at 2 (P.A. Jay, *Opinion* (Nov. 26, 1824)).

Viewed in light of the terms of this debate, which was not finally resolved until this Court's decision in *Martin v. Wadell* in 1842,² the only proper conclusion is that the "exclusive right of property" granted to New Jersey in Article III entailed no more than a *jus privatum* right in the underwater lands on the western side of the Hudson. The Commissioners and their contemporaries understood fully the distinction between *jus privatum* and *jus publicum* interests in underwater lands, they used the term "property" to denote *jus privatum* rights and the term "jurisdiction" to denote *jus publicum* obligations as enforced by *jus regium* powers, and they viewed these rights as conceptually segregable even if, for purposes of the ongoing debate, certain of the

² In *Martin*—ten years after the Compact—the Court adopted the *Arnold* holding that lands under navigable waters were held "as a public trust for the benefit of the whole community," 41 U.S. at 413, and thereby laid the groundwork for later case law permitting alienation of such lands (and thus severance of *jus privatum* and *jus publicum* interests) upon satisfaction of a public interest standard. See *Coeur d'Alene Tribe*, 1997 WL 338603, at *17; Lazarus, *supra*, at 633-44 (tracing evolution of "public trust" doctrine).

Commissioners' contemporaries might have been unwilling to concede that the rights were entirely severable.

This distinction and terms that would be used consistently to discuss it had become part of the dialogue between New York and New Jersey as early as 1807. In one of the Propositions submitted by the New Jersey Commissioners to their New York counterparts during the first round of negotiations that year, New Jersey acknowledged that "[a]rms of the sea and navigable rivers are subject to a *jus publicum*, a *jus privatum*, and a *jus regium*." (NJ Ex. 213.) In another Proposition, New Jersey explained the bases for its claims to New York Harbor and the Hudson River in the following terms:

[T]he King of Great-Britain possessed, not only the *property* in all navigable rivers, but by his prerogative, claimed and exercised (among his *regalia*) *jurisdiction* over them, and over all shores below high water mark, and over all ports and harbors whatsoever within his American colonies. It is therefore evident that if the grant to the first settlers of New-Jersey, had contained an express limitation to high water mark, it would only follow that the *property* as well as the *jurisdiction* over the subject matter now in controversy was retained by the duke and again resulted to the crown when he became king of England, and would be no more than if the crown had retained originally the *property & jurisdiction* of a large lake in the centre of New-Jersey.

(NJ Ex. 209 (emphasis added).) The New Jersey Commissioners went on to contend that the rights thus retained by the Crown devolved upon New Jersey after the Revolution. However, what matters is not the validity of New Jersey's claims, but the fact that it framed these claims in terms of two distinct rights, "property" and "jurisdiction," which, for the reasons set forth above, can be equated with

jus privatum rights and *jus publicum* obligations as enforced by *jus regium* powers.³

The terms of the dialogue would not change significantly in the ensuing twenty years. In 1828, New Jersey was still expressing concerns about New York's "ownership and jurisdiction up to [New Jersey's] very shores," setting forth distinct bases for its claims to both "property" and "jurisdiction" in the Hudson River, and contending for "equal and concurrent rights over the Hudson" and "property rightfully extend[ing] to the middle of that river." (NJ Ex. 273, at 10; NJ Ex. 278, at 40, 44.) Similarly, in its 1829 Bill in this Court, New Jersey's repeated refrain was for "property, sovereignty, and jurisdiction," with the Bill's only efforts to distinguish among these rights suggesting that "sovereignty" could not be differentiated from "jurisdiction" and that "property" was something that the State could hold in the

³ That there were always two interests in these underwater lands at issue is also evidenced by the terms of the 1804 dispute between the Associates of the Jersey Company and the Corporation of the City of New York that is referenced in several of the Commissioners' reports. (NJ Ex. 272, at 6-7.) Concerned that the City of New York might claim some interest in the underwater lands adjacent to Powles Hook (now Jersey City) on which it planned to build wharves and piers, the Jersey Company retained Alexander Hamilton to evaluate both New York City's "property" and "jurisdictional" claims to these lands. Hamilton declined to opine concerning the "jurisdictional" claims, but he had no doubts that "the Corporation of the City of New York have no right of soil in or title to the land, under the water to and adjoining Powles Hook." 26 *The Papers of Alexander Hamilton* 221, 224, 227-31 (Harold C. Syrett et al. eds., 1961-79). Attorneys later retained by the City of New York agreed with Hamilton's conclusion as to the City's lack of property rights, but believed that the State had both property and jurisdictional rights in these lands, and ultimately persuaded the New York Attorney General to bring a suit that was litigated for years afterwards with inconclusive results. 3 *Minutes of the Common Council of the City of New York, 1675-1776*, at 520-23, 552, 693-94, 712-13 (1905); see also Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, at 115-16 (1983).

same manner as an individual, and therefore, a mere *jus privatum* right. (NJ Ex. 293, at 26 (contending that historically "no right of property existed or could exist" in the Hudson River, as demonstrated by the fact that "all the ancient grants made by the Duke of York to individuals while he remained Duke . . . [were] limited to the low-water mark" on the New York side of the river).)

In light of contemporaneous understandings of the rights at issue and the terminology of the longstanding dialogue between the States, the terms of compromise reached in 1833 appear unambiguous. New Jersey had sought both "property" and "jurisdiction" in the lands under the waters dividing the states, with a full understanding of the distinction between these two rights. It settled for a mere "property" right, with none of the trappings of "jurisdiction." If granted, the right of "jurisdiction" would have given New Jersey both the *jus privatum* rights of a private owner and the *jus publicum* obligations of a sovereign in these underwater lands. However, it was not granted. Instead, "exclusive jurisdiction," and therefore the obligation to use *jus regium* powers to protect *jus publicum* rights, were expressly left in the hands of New York.⁴

Much as the New Jersey Proprietors had ceded the "right of government" back to the Crown in 1702 in exchange for a

⁴ The agreement reached in the Compact of 1834 with respect to underwater lands is to be contrasted with the agreement reached between New York and Massachusetts in the earlier Hartford Compact. In the Hartford Compact, which this Court addressed in *Massachusetts v. New York*, 271 U.S. 65 (1926), "property rights" in "underwater lands" were not expressly mentioned, so the Court invoked the presumption that any rights not expressly granted by a sovereign are retained by the sovereign to hold that lands under Lake Ontario, in which Massachusetts claimed a proprietary interest, remained the property of New York by virtue of its retention of jurisdiction over the Lake. *Id.* at 90. Here, by contrast, "property" and "jurisdictional" rights in underwater lands are expressly segregated, and should be so regarded by this Court.

continued "right of property" in lands granted to them by the Duke of York, New Jersey's 1833 Commissioners allowed New York to retain the power of governmental jurisdiction over the underwater lands on the western side of the Hudson in exchange for an "exclusive right of property" in the same lands. That right, which Article III expressly strips of any jurisdictional powers, cannot be construed any more broadly than the property rights of the Proprietors after their 1702 renunciation of the "right of government."⁵

**B. *JUS PRIVATUM* RIGHTS OF
PROPERTY HAVE NEVER BEEN
EQUATED WITH SOVEREIGNTY**

Accepting that Article III granted to New Jersey no more than a *jus privatum* right of property in the waters and underwater lands west of the middle of the Hudson River undermines entirely the Report's conclusion that New Jersey's "exclusive right of property" must be equated with "sovereignty" over those waters and underwater lands. The *jus publicum* obligation, with its correlative *jus regium* power of enforcement, constitutes the authority of a sovereign. *Jus privatum* rights, by contrast, are not the equivalent of

⁵ This is not to say that New Jersey did not attribute great value to the rights it obtained under Article III. By virtue of Article III, New Jersey acquired title to property that could generate revenues in two ways: by sale for future filling and development, and for use as "Oyster grounds." With respect to the former, Peter Augustus Jay, in the Opinion he rendered on behalf of the Proprietors in 1824, acknowledged that a *jus privatum* right in underwater lands could have value notwithstanding *jus publicum* limitations on its use because "if the soil is private property, then no one can, without the consent of the owner, erect upon it wharves, mill-dams or other erections." Opinion of P.A. Jay, *supra*, at 3. As to the latter, one contemporary source suggests that New Jersey's interest in a "right of property" in the Hudson River and New York Bay was chiefly provoked by a desire to control the valuable "Oyster grounds" in those waters. Letter from John Rutherford to Peter D. Vroom dated June 10, 1832 (Southard Papers, Princeton University).

sovereignty, and no court or commentator, at the time of the Compact or since, has held otherwise.

In the understanding of the 1820s and 1830s, the distinction between the state as a sovereign and the state as a private property holder was well-established and fully appreciated. Indeed, Vattel, Chancellor Kent, and other commentators readily acknowledged that a "sovereign" could hold property like an individual, but, in the same instant, observed that such proprietary activities were wholly independent of its powers as a sovereign. See, e.g., Emmerich de Vattel, *The Law of Nations*, bk. II, § 83 (1792) ("[M]any sovereigns have fiefs, and other properties, in the lands of another prince; and they therefore possess in the manner of individuals."). The decisions of this Court, at the time of the Compact and since, reflect a similar understanding of the distinction between a government's "sovereign" and "proprietary" activities. See *The Santissima Trinidad*, 20 U.S. 283, 353 (1822) (recognizing that a sovereign may "hold a private domain within another territory"); *City of Hoboken v. Pennsylvania R.R.*, 124 U.S. 656 (1888) (distinguishing between the "public easement of access to navigable waters," which "inheres in the state in its sovereign capacity," and the "title of the state in land under tide-waters" which is "strictly proprietary").

The Commissioners in the 1833 negotiations shared fully this understanding of the distinction between a sovereign entity's "sovereign" and more limited "proprietary" activities. Indeed, the 1807 New Jersey Commissioners, among whom was future 1833 Commissioner James Parker, had cited Vattel in one of their letters to their New York counterparts for the proposition that "the empire of a country and the property in its soil are not inseparable," and that therefore, "nothing prevents the possibility of property belonging to a nation in places not under its obedience." (NJ Ex. 209, at 43 (citing Vattel, *supra*, § 43).)

On the New York side of the table, both Peter Augustus Jay and Benjamin F. Butler, had confronted this distinction more than once in dealing with the affairs of the Corporation of the City of New York, an entity whose property-holding powers were as important as and, in an age of increasing regulatory activity, sometimes difficult to distinguish from its governmental or jurisdictional powers. See generally Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (1983); see also Elizabeth Blackmar, *Manhattan for Rent, 1785-1850* (1989).

Thus, in *Mayor of New York v. Slack*, 3 Wheel. Cr. Cas. 237 (N.Y.C.P. 1824), Jay, who often represented the Corporation in the 1820s, had a part in persuading a New York court to hold that "in respect to a corporation invested with the local government of a place, a distinction is to be made between its capacity for holding and transferring property, and its capacity to legislate for the good of the place with whose government it is invested." *Slack*, 3 Wheel. Cr. Cas. at 258-59. As a property holder, the sovereign entity could buy, hold and sell property like an individual, and be bound by the property-holding obligations of an individual, but these obligations were distinct from and always trumped by its obligations to use its entirely distinct "legislative power" for the public good.⁶

⁶ Among the properties held by the Corporation of the City of New York in its "proprietary" role were the underwater lands bordering lower Manhattan (to a distance of 400 feet from the shore) that had been conveyed by the City to individuals in "waterlot grants" since the late 17th century. See Hartog, *supra*, at 44-59. In the Opinions rendered on behalf of the New Jersey Proprietors in 1824, both Chancellor Kent and Jay pointed out that these underwater lands—like those granted to New Jersey by Article III—had been granted to the City as "property," and not as part of any sovereign prerogative. See Opinion of Chancellor Kent, *supra*, at 14; Opinion of P.A. Jay, *supra*, at 7.

Butler recognized the same distinction, with the same effect, in rendering an opinion in January 1834 as to whether the Corporation of the City of New York could grant a license for a second ferry to Brooklyn:

The authority to establish ferries granted to the city by the charter, is a branch of the sovereign power, and like all the other legislative and administrative powers conferred on them, was granted to the Corporation "*for the good rule and government of the City,*" and *not as a subject of property*. In this respect, it is to be carefully distinguished from the express grant of the Old Ferry, contained in the first charter, and subsequently confirmed. *The franchise of keeping up that ferry for ever, is granted to the Corporation as an incorporeal hereditament, to be held by them on the same tenure as if the same had been granted to an individual. They have a freehold property in it.* But the general power to establish other ferries is delegated to them as depositories in this respect of the prerogative of the government.

All the Proceedings in Relation to the New South Ferry between the Cities of New York and Brooklyn from December 1825 to January 1835 (1835) (emphasis added).

It is this same distinction between "sovereign" and "proprietary" rights, so familiar to the Commissioners and their contemporaries, that is embodied in the Compact's grant of *jus privatum* rights to New Jersey in underwater lands with respect to which New York retained *jus publicum* obligations and *jus regium* powers. By settling for an "exclusive right of property" in lands expressly subject to New York jurisdiction, New Jersey accepted what Vattel called "fiefs, and other properties, in the lands of another prince," and New Jersey cannot now be held to "possess" such lands other than

"in the manner of [an] individual." Vattel, *supra*, at bk. II, § 83.

Subsequent courts have so held. See *State v. Babcock*, 30 N.J.L. 29, 31 (1862) ("New Jersey is bounded by the middle of the Hudson river, and *the state owns the land under the water to that extent*," with "exclusive jurisdiction" retained by New York) (emphasis added); *Kiernan v. The Norma (The Norma)*, 32 F. 411 (S.D.N.Y. 1887) ("[T]he state of New Jersey has nothing more than the mere right of property,—the naked legal title."); see also *People v. Central R.R.*, 42 N.Y. 283, 312 (1870) (Earl, J. dissenting) ("By this provision simply *property* is given to New Jersey, and the governmental jurisdiction and authority of New York is not interfered with.").

New Jersey cannot claim more now. It was property rights, and property rights alone, that New Jersey bargained for and obtained in Article III. The Report's conclusions to the contrary must consequently be rejected.

POINT II

IN THE ALTERNATIVE, THE COURT SHOULD AFFIRMATIVELY DETERMINE THAT ARTICLE III GRANTED TO NEW YORK, AT THE VERY LEAST, "POLICE POWER" JURISDICTION ON THE NEW JERSEY SIDE OF THE ARTICLE I BOUNDARY LINE

Should the Court conclude that neither Article II nor Article III gives New York full "sovereignty" over all of the current Ellis Island, it should alternatively determine that Article III left to New York, *at the very least*, "police power" jurisdiction over all of the Hudson River's waters and underwater lands, including the landfilled portions of Ellis Island. The Report, which confines itself to the "sovereign" effect of the Article I boundary line, never reaches this issue. It makes no attempt to define the scope of New York's residual (and facially "exclusive") jurisdiction on the New

Jersey side of that boundary under Article III. The Special Master several times alludes to this jurisdiction as "limited," "legal," and, most significantly, as "police" jurisdiction. (R. at 57, 65, 67, 76, 78.) But the Report makes no effort to further circumscribe it, or determine its relationship to New Jersey's purportedly "sovereign" powers over the waters and underwater lands in the vicinity of Ellis Island or at any other point along the boundary line's more than twenty-mile length. The Court must fill this gap in the Report's conclusions, by affirmatively determining that New York has, *at the very least*, "police power" jurisdiction over the landfilled portions of Ellis Island.

**A. AT THE VERY LEAST, NEW YORK RETAINED
UNDER ARTICLE III BROAD REGULATORY
POWERS OVER THE WATERS AND UNDERWATER
LANDS OF THE HUDSON RIVER**

If New York did not retain "sovereign" jurisdiction over the whole of the Hudson River under Article III, it did retain, *at the very least*, jurisdiction over a broad array of regulatory matters affecting both the waters and underwater lands of that river. Such regulatory powers, contemporaneous evidence shows, are the least that the New York Commissioners bargained for in the 1833 negotiations and what both the New Jersey Commissioners and subsequent commentators and case law concede New York retained in the Compact.

The New York Commissioners set forth what they believed they had secured for New York in an October 20, 1833 letter to New York Governor William L. Marcy:

[W]e trust that *the jurisdiction necessary for the health, improvements, and police of that City* has been amply secured, and that the agreement herewith delivered to you will be satisfactory to the legislature and to our fellow-citizens generally.

(NJ Ex. 312 (emphasis added).) This post-negotiation account of New York's objectives accords with the assurances offered by Benjamin F. Butler, the lead New York Commissioner, to fellow Commissioner Peter Augustus Jay in March 1833, that "what is due to *the commerce, health, police and improvements of your city . . . [is] to be carefully considered in the propositions we may submit or receive.*" Letter from Butler to Jay quoted in John Jay, *Memorials of Peter A. Jay: Compiled for his Descendants* (1929) (emphasis added).⁷

It also accords with what the New Jersey Commissioners conceded as early as 1827 New Jersey was willing to relinquish to New York:

In terms of settlement submitted by your commissioners, they endeavored to remove any just ground of exception, by *yielding to New-York exclusive jurisdiction over the adjoining waters in several important matters, which the health and commercial welfare of the city of New-York seemed to require.*

(NJ Ex. 273, at 10 (emphasis added).) It is also what Justice Lucius Q.C. Elmer, one of the New Jersey Commissioners, acknowledged years later had, at a minimum, been retained by New York in Article III:

It being suggested on behalf of New Jersey, that, waiving all considerations of abstract right, New York should acknowledge the true boundary line to be the middle of the river, and that New Jersey should agree

⁷ Butler's statements to Jay in early 1833 also accord with statements Butler made to 1828 New Jersey Commissioner John Rutherford in June 1832, to the effect that New York had no interest in the "Oyster grounds" of New York Bay (*i.e.*, property rights) but was "anxious for some regulation relative to quarantine and jurisdiction near the city of New York." Letter from Rutherford to Peter D. Vroom dated June 10, 1832 (Southard Papers, Princeton University).

that *New York should have all such rights west of that line as might be deemed important to secure to that State the right to regulate the police and the quarantine on the whole of the waters dividing the States*; this proposition, after time had been taken for full consideration and consultation, was acceded to by the New York commissioners.

Lucius Q.C. Elmer, *The Constitution and Government of the Province and State of New Jersey* 459 (1872) (emphasis added); see also *State v. Babcock*, 30 N.J.L. 29, 33 (1862).

Subsequent case law has described the rights and powers retained by New York in comparable terms. Thus, in the 1870 *Central Railroad* case, the New York Court of Appeals concluded that Article III granted to New York a "police jurisdiction" for the "protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York." *People v. Central R.R.*, 42 N.Y. 283, 300 (1870). Later cases have followed suit. See *Ferguson v. Ross*, 27 N.E. 954 (N.Y. 1891) ("the purpose of vesting exclusive jurisdiction over these waters in the state of New York was to promote the interests of commerce and navigation"); *Ross v. Mayor of Edgewater*, 180 A. 866, 870 (N.J. 1935) (Article III permitted New York to retain "a general police jurisdiction, for the promotion of the interests of commerce and navigation, over the waters of the bay and river to the low-water mark of the New Jersey shore"), *aff'd*, 184 A. 810 (N.J.), *cert. denied*, 299 U.S. 543 (1936); *Tennant v. State Bd. of Taxes and Assessments*, 113 A. 254 (N.J. 1921) ("this jurisdiction has been held by the courts of both New York and New Jersey to be a jurisdiction simply for the exercise of the police power").

**B. THE BROAD REGULATORY POWERS
RETAINED BY NEW YORK UNDER
ARTICLE III ARE SYNONYMOUS
WITH THE "POLICE POWER" OF
STATE AND LOCAL GOVERNMENTS**

The broad powers that all parties thus concede were retained by New York under Article III are synonymous with what this Court has since come to recognize as the "police power" of state and local governments. In fact, the "police power" doctrine had its origins in the same period as the Compact, and was being vigorously debated in this and other courts during the years when New York and New Jersey were moving toward a resolution of their boundary dispute. See William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061 (1994). The terms of that debate, and the scope of the evolving doctrine, are echoed in what the Commissioners and others described at the time as the powers New York retained under Article III.

This crossover between the developing "police power" case law and the Compact is not surprising for a number of reasons, not the least of which is the fact that Peter Augustus Jay, the New York Commissioner with the greatest interest in the "commerce, health, police and improvements" of New York City, represented the Corporation of the City of New York in a trio of cases in the early 1820s, the so-called "cemetery cases," that legal scholars acknowledge laid the groundwork for much subsequent "police power" jurisprudence.⁸ See *Mayor of New York v. Slack*, 3 Wheel.

⁸ The "cemetery cases" concerned the validity of a New York City ordinance prohibiting burials in cemeteries the City had granted to various New York City churches more than a century before. The religious groups made a variety of arguments based on vested rights and real property theories while the City, represented by Jay, argued that the

Cr. Cas. 237 (N.Y.C.P. 1824); *Corporation of the Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538 (N.Y. Sup. Ct. 1826); *Coates v. Mayor of New York*, 7 Cow. 585 (N.Y. Sup. Ct. 1827); see generally Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (1983); Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 565 (1904); Christopher Tiedemann, *A Treatise on the Limitations of the Police Power in the United States* 427, 583 (1886); Thomas M. Cooley, *A Treatise on Constitutional Limitations* 127, 206-7, 283, 595 (1868); 2 James Kent, *Commentaries on American Law* 274-76 (1826-30).

The holdings of the New York courts in the "cemetery cases" are echoed in various contemporaneous and later "police power" cases in this Court. In these cases, the main inquiry is the line between state and federal power, but in pursuing this inquiry, the Court often found itself compelled to define the scope of the powers that are left to the states. In doing so, it circumscribed the powers reserved to the states in the same broad terms that contemporaneous accounts describe the powers that New York retained under Article III.

Most interesting in this respect are *Gibbons v. Ogden*, 22 U.S. 1 (1824), *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829), and *Mayor of New York v. Miln*, 36 U.S. 102 (1837). All three of these cases examined the scope of the "police power" in the context of the development,

statute entailed a legitimate exercise of the City's power to enact "police regulations." *Coates v. Mayor of New York*, 7 Cow. 585, 597-601 (N.Y. Sup. Ct. 1827) (Argument of P.A. Jay). The New York court upheld the City ordinance as validly targeted at the "health, welfare and improvement" of the City, and therefore, among the array of regulations properly categorized as "police regulations." See *Slack*, 3 Wheel. Cr. Cas. at 243-45, 249-52 (enumerating the many areas in which New York City had validly legislated for the public good).

maintenance and management of rivers, harbors and underwater lands—the same setting that it was contemplated New York would exercise the "exclusive jurisdiction" retained by it in Article III. In so doing, these cases confirm that what the Commissioners believed New York had retained in Article III can properly be equated with what this Court was coming to define, with ever greater specificity, as the "police power."

Gibbons, with which the Commissioners and their contemporaries were undoubtedly familiar, concerned the federal power to regulate commerce and navigation in interstate navigable waterways like the Hudson River. In *Gibbons*, Chief Justice Marshall mapped out the contours of most commerce clause and police power jurisprudence to come, and, in so doing, left to the states precisely the powers over New York's rapidly developing harbor that the New York Commissioners retained for New York in Article III—"that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all of which can be most advantageously exercised by the States themselves," including "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c." 22 U.S. at 203.

Willson confirmed that the filling and improvement of underwater lands, like those over which Article III gave New York "exclusive jurisdiction," was within the "police power" of the States. Confronted with a "commerce clause" challenge to a Delaware statute authorizing the erection of a dam across a coastal creek, the Court looked to the object and likely effect of the legislation and found that "the value of the property on its banks must be enhanced . . . and the health of the inhabitants probably improved." 27 U.S. at 251. Without clear indication that any issue of federal concern was

implicated, this Court upheld the challenged statute, concluding that "[m]easures calculated to produce these objects [i.e., the filling and improvement of underwater lands], provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." *Id.* at 251. The Commissioners on both sides of the 1833 negotiating table—on the basis of over a century of landfilling in New York Harbor—also believed that the power to authorize improvements of underwater lands was in the States, and by the terms of Article III, expressly reserved this power (to the extent that the underwater lands were not immediately contiguous to the New Jersey shore) to New York.

Miln expanded the scope of the police power still further, to permit the States to regulate with respect to all matters that were essential to "the health and commercial welfare" of the community. In *Miln*, this Court upheld a New York statute requiring masters of vessels arriving in the same New York Harbor with which the Compact dealt to report the names of foreign passengers. It did so, in part, by looking to a broadly-worded *Federalist* pronouncement that "the powers reserved to the several states, will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement and prosperity of the state." 36 U.S. at 133 (quoting *The Federalist* No. 45).

In a passage that echoes clearly the words of the Commissioners concerning what New York had retained in Article III, this Court held in *Miln* that the states have "undeniable and unlimited jurisdiction" to "advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which [they] may deem to be conducive to these ends." *Id.* at 139. The "undeniable and unlimited jurisdiction" that this Court thus expressly reserved to the States is no different

from the narrowest reading of the "exclusive right of jurisdiction" at issue in Article III, which the New York Commissioners told New York's Governor in October 1833 had been "secured" for New York and was "necessary for the health, improvements, and police" of New York City. (NJ Ex. 312.)

**C. THE "POLICE POWER" JURISDICTION RETAINED
BY NEW YORK UNDER ARTICLE III GIVES IT
CURRENT JURISDICTION OVER HISTORIC
PRESERVATION MATTERS ON THE NEW JERSEY
SIDE OF THE ARTICLE I BOUNDARY**

The "police power" jurisdiction that, at a minimum, New York retained in Article III gives it current regulatory control over many matters, including historic preservation issues, on the New Jersey side of the Article I boundary. The already expansive definition of the "police power" developed by the time of the Compact expanded still further throughout the 19th and into the 20th century. The measures required to address the "health, welfare and improvements" of the community grew more numerous as society grew more complex, and this Court, with consistent flexibility, repeatedly lengthened the list of subjects properly subject to the "police power." Under its Article III grant, New York is now entitled to exercise jurisdiction on the New Jersey side of the boundary line (including on the landfilled portions of Ellis Island) over all these subjects.

***1. The Scope of the "Police Power"
Jurisdiction Retained By New York
Under Article III Has Expanded
Since Execution of the Compact***

The scope of the "police power" doctrine has expanded significantly since execution of the Compact. As a result, the distinct powers contained in the "police power," or which may exist beyond its scope, have grown less and less

susceptible of precise or exhaustive definition. In 1911, Justice Holmes could describe the "police power" as "extend[ing] to all the great public needs [and] . . . be[ing] put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911). By 1954, its parameters had grown broader still, provoking Justice Douglas to observe that the "purposes" served by the "police power" are "neither abstractly nor historically capable of complete definition." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

What is clear, however, is that in the years since the Compact, this Court has upheld a broad array of social and economic regulation under the rubric of the "police power," in the face of challenges that these regulations violated vested property rights. *See generally* William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L. J. 1061 (1994); Maureen Kordesh, "I Will Build My House With Sticks": *The Splintering of Property Interests Under The Fifth Amendment May Be Hazardous To Private Property*, 20 HARV. ENV. L. REV. 397 (1997); *see also* Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (1904).

Most significantly for this case, the "police power" has become the bedrock upon which historic preservation law has developed. In a line of cases commencing with *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and running through *City of Boerne v. Flores*, No. 95-2074, 1997 WL 345322 (U.S. June 25, 1997), this Court has consistently looked to state "police power" to validate regulations concerned with historic and aesthetic land-use and zoning issues. In *Euclid*, the Court upheld a zoning ordinance prohibiting commercial development in a residential area, concluding that "[t]he ordinance now under review, and all

similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare." *Id.* at 387-88.

Historic preservation law came into its own when the Court similarly invoked the "police power" to uphold land-use controls based on aesthetic considerations in *Berman v. Parker*. In *Berman*, the question raised was whether the District of Columbia could raze a salvageable building in a deteriorating neighborhood as part of an aesthetically-driven urban renewal plan. Looking to the broad scope of the "police power," Justice Douglas answered on behalf of the Court with a resounding yes, concluding that "[i]t is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33.

All doubt as to whether historic preservation regulation was within the scope of government police power was dispelled by the Court's 1978 decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Specifically, the Court held that restrictions imposed by New York City's Landmarks Preservation Law on New York's Grand Central Station did not effect a taking of the property in violation of the Fifth Amendment. In upholding the New York law, the Court explicitly dismissed the idea that aesthetic considerations alone are not a proper basis for the exercise of the government's police power. To the contrary, the *Penn Central* court affirmatively concluded that—on the basis of the "police power"—a state could constitutionally promote historic preservation goals because such goals undoubtedly served the public interest.

**2. *New York Is Entitled To Exercise
Jurisdiction To The Full
Extent of The "Police Power"***

New York is entitled to reap the benefits of the expanded scope of the "police power" by being permitted to use its Article III jurisdiction to regulate with respect to, *inter alia*, historic preservation matters on New Jersey's side of the Hudson. This is the case for two separate sets of reasons. *First*, to the extent that the Compact is construed as a contract, such a construction accords with the intent of its drafters, and should be given effect. *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (compacts are construed as both contracts and statutes); *Massachusetts v. New York*, 271 U.S. 65 (1926) (object of compact interpretation is construction in accordance with contemporaneous expectations). The jurisdiction that New York retained in Article III reaches at least as far as controls on such "improvements" of the underwater lands surrounding Ellis Island as were within the contemplation of the 1833 Commissioners. In the 18th and 19th century, the Corporation of the City of New York imposed on the recipients of "waterlot grants" parameters for development with zoning-like specifications that included exact street dimensions and development timetables. *See Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, at 44-59 (1983) (discussing terms of 18th Century waterlot grants). The New York Commissioners, who were familiar with the terms of such waterlot grants, would have expected New York to have at least this measure of control over the development of the underwater lands surrounding Ellis Island, and, translated into contemporary terms, this means that New York's historic preservation regulations

should apply to the landmark structures on both the "original" and landfilled portions of Ellis Island.⁹

Second, to the extent that the Compact is construed, as it properly may be, as a federal statute, the rights that New York obtained in the bargain it struck with New Jersey in 1833 are no different from the rights conferred by other federal statutes. This Court has repeatedly expanded the scope of the rights and protections derived from such sources to adapt to changed circumstances, so there is no reason that the "police power" conferred by Article III should not be interpreted in similarly contemporary terms. *See Diamond v. Chakrabarty*, 447 U.S. 303 (1980) ("This Court frequently has observed that a statute is not to be confined to the 'particular application . . . contemplated by the legislators.'"); *Barr v. United States*, 324 U.S. 83 (1945) ("If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."); *see, e.g., United States v. Johnson*, 994 F.2d 980, 986 (2d Cir.) (construing statute ceding land to Federal

⁹ To the extent any uncertainty exists as to the scope of the powers the Commissioners contemplated for New York, New York should be given the benefit of the doubt and acknowledged to hold any powers not expressly granted to New Jersey. Grants from sovereign to subject or another sovereign have traditionally been interpreted most strongly against the grantee. *See United States v. Oregon*, 295 U.S. 1, 14 (1935); *Massachusetts v. New York*, 271 U.S. 65, 89 (1926); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 91 N.E. 846, 847 (N.Y. 1910), *aff'd* 229 U.S. 82 (1913). Here, this presumption operates against New Jersey, since it was New York who had acknowledged sovereignty over the whole of the Hudson until 1833, and was thus parting with a measure of its sovereign jurisdiction in Article III. Thus, any ambiguity as to the meaning of Article III's "exclusive right of jurisdiction" in "lands covered by said waters" must be construed against New Jersey and in New York's favor to include all past and present rights not expressly granted to New Jersey by the Compact.

Government for naval purposes so as to avoid "a rigid interpretation of antiquated deeds that did not fully anticipate the complex development of naval operations"), *cert. denied*, 510 U.S. 959 (1993). The Court should do the same here by interpreting the "exclusive right of jurisdiction" left to New York by Article III to extend to the entire array of regulatory powers ordinarily exercised by a state, including the power to police the preservation of Ellis Island as a national landmark.

CONCLUSION

The Court should conclude that New York has sovereign power over Ellis Island by virtue of Article II, and Article II alone. If the Court proceeds further and turns to Article III, it must reject the Report's Article III conclusions because the Report's equation of "property" and "sovereignty" is wholly untenable. In the alternative, should the Court determine that neither Article II nor Article III gives New York sovereignty over Ellis Island and the western half of the Hudson, it should determine that New York has, *at the very least*, "police power" jurisdiction over these areas.

Dated: New York, New York

July 30, 1997

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Supreme Court, U. S.
F I L E D
JUL 31 1997

No. 120, Original

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF NEW JERSEY,
Plaintiff,
v.
STATE OF NEW YORK,
Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE IN SUPPORT OF THE
EXCEPTIONS OF THE STATE OF NEW
YORK AND BRIEF OF AMICI CURIAE**

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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**MOTION OF NEW YORK LANDMARKS
CONSERVANCY, PRESERVATION
LEAGUE OF NEW YORK STATE, AND
HISTORIC DISTRICTS COUNCIL FOR
LEAVE TO FILE BRIEF AS *AMICI CURIAE***

Pursuant to Rule 37 of the Rules of this Court, the New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council (collectively, "Proposed New York Landmarks Amici" or "Proposed Amici") respectfully move for leave to file the accompanying brief as *amici curiae* in support of the State of New York's Exceptions to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R."). The State of New York has consented to the filing of this Brief. The consent of the State of New Jersey has been requested and refused.

The Proposed New York Landmarks Amici are local and state organizations dedicated to historic preservation. This

action, and the result recommended by the Special Master in the Report, raises the question of whether Ellis Island's historic structures are properly subject to the well-established and consistently-enforced historic preservation regulations of New York City or the less protective regulations of Jersey City, New Jersey. As organizations that have for years fought to safeguard the landmarks of New York State and City, the Proposed Amici have a demonstrable interest in the answer to this question.

Ellis Island, the gateway to this nation for millions of Americans, is an irreplaceable part of New York's cultural heritage. It was originally a part of New York, and, Proposed Amici believe, the Compact's drafters intended for it to remain a part of New York. The Report's conclusions to the contrary are unsupported by the plain meaning of the Compact, contemporaneous construction of its terms, the record in this case, and relevant precedent. Its recommendations must consequently be rejected.

The Proposed Amici possess a unique store of knowledge about historic preservation generally and the history of the New York City region in particular:

NEW YORK LANDMARKS CONSERVANCY

The New York Landmarks Conservancy is a not-for-profit civic organization chartered by New York State. It is dedicated to the preservation of structures of architectural, cultural and historic significance as well as to the designation and revitalization of historic districts. The Conservancy furthers these objectives by making grants and loans, and providing technical assistance, holding workshops, distributing publications, and sponsoring restoration and rehabilitation projects. The Conservancy is an experienced advocate for sound policies that encourage preservation as an integral part of urban planning. In this capacity, the Conservancy testifies frequently before the New York City Council, Board of

Standards and Appeals, City Planning Commission and Landmarks Preservation Commission on issues pertaining to historic preservation.

PRESERVATION LEAGUE OF NEW YORK STATE

The Preservation League of New York State is a New York not-for-profit corporation. Its mission is to protect and enhance historic values and property in the State of New York. Its 2,000 members throughout the state are concerned with the application and interpretation of preservation laws as well as environmental laws that impact upon historic resources. The League offers advice to hundreds of citizens every year who are concerned about the fate of historic properties in their region. It also maintains grant programs to assist in the rehabilitation and use of historic properties. The League has appeared as *amicus curiae* in numerous cases, such as the present one, concerning New York's landmarks preservation laws.

HISTORIC DISTRICTS COUNCIL

The Historic Districts Council is the citywide voice for New York City's 66 designated historic districts and for other neighborhoods meriting preservation. The Council's mission, to promote preservation awareness and involvement among New Yorkers, is implemented through a program of education, conferences, publications, and technical assistance. The Council's 28-member Board of Directors includes representatives from all five boroughs, 19 historic neighborhoods and three county-wide organizations, as well as from the design, planning and legal professions. The Council is the only grassroots association in New York City singularly dedicated to historic districts and the landmarks preservation laws that protect them.

The Proposed Amici participated at trial and in summary judgment and post-trial briefing before the Special Master.¹ Having now reviewed the Report, the record, and the applicable statutes and case law, the Proposed Amici believe that the Report should be rejected for at least two reasons. *First*, the Report incorrectly equates "property," as used in Article III, with "sovereignty," a term which appears nowhere in the Compact. No court or commentator at the time of the Compact would have found "sovereignty" in a mere "right of property." And it was for "property" rights, and "property" rights alone, that New Jersey settled in the Compact. This Court should not hold otherwise.

Second—and in the alternative—even if Article III did not give New York "sovereign" jurisdiction to the low water mark on the New Jersey shore, *at the very least* it gave New York "police power" jurisdiction over the same area. The Report's failure to address this issue is of particular significance to the Proposed Amici because what the Report acknowledges to be New York's "police jurisdiction" on the New Jersey side of the Article I boundary line is, in Proposed Amici's view, enough to give New York jurisdiction over, *inter alia*, "historic preservation" matters on the New Jersey side of the boundary. However, all indications are that New Jersey would think otherwise. Thus, the Court must fill this gap in the Report's conclusions, by affirmatively determining that New York has, *at the very least*, "police power" jurisdiction over the landfilled portions of Ellis Island.

The Proposed Amici are in a unique position to provide the Court with incisive views on these issues. The Proposed

¹ The amicus group in which the Proposed New York Landmarks Amici participated below also included the National Trust for Historic Preservation in the United States and the Municipal Art Society of New York. The latter of these organizations is filing a separate Brief in support of New York's Exceptions, in which Proposed Amici herein elected not to join because of their desire to address the distinct issues raised by the Report outlined in the accompanying Brief.

Amici possess a unique store of knowledge about historic preservation generally and the history of New York City and Ellis Island in particular. Their experience in the area of historic preservation should be helpful (in combination with the views of Proposed Preservation Amici) in the full presentation to the Court of the novel issues raised by this action. Their access to scholars familiar with and research materials concerning New York City history give them the resources to subject the Report's premises and conclusions to searching analysis. In an original case of this type, where the Court's mandate is to not reach any decisions of necessarily far-reaching import before exhausting all valid avenues of inquiry, the participation of the Proposed Amici will, consistent with Supreme Court Rule 37.1, be of "considerable help" to the Court's review of the Report while allowing the Proposed Amici to fulfill their mission of speaking out forcefully to safeguard New York's landmarks, including the historic structures of Ellis Island.

WHEREFORE, the Proposed New York Landmarks Amici respectfully move this Court that leave be granted to file the annexed brief as *amici curiae*.

Dated: New York, New York

July 30, 1997

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No. 120, Original
IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE
EXCEPTIONS OF THE STATE OF NEW YORK**

The New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council (collectively, the "New York Landmarks Amici") submit this brief, as *amici curiae*, in support of the Exceptions of the State of New York to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R. ").

INTEREST OF *AMICI CURIAE*¹

The New York Landmarks Amici are local and state organizations dedicated to historic preservation. This action concerns whether the State of New York or the State of New Jersey has "sovereign" jurisdiction over Ellis Island. The dispute turns on the interpretation of the terms of a compact entered into between New York and New Jersey in 1834 concerning their Hudson River/New York Harbor boundary (the "Compact"), and the course of conduct of the two states with regard to this boundary in the ensuing century and a half.

¹ Pursuant to Rule 37.6 of this Court, the New York Landmarks Amici state that this Brief was authored entirely by counsel for the Amici, and no person or entity other than the Amici and their counsel made a monetary contribution to the preparation of this Brief.

More importantly, however, this action, and the result recommended by the Special Master in the Report, raise the question of whether Ellis Island's historic structures are properly subject to the well-established and consistently-enforced historic preservation regulations of New York City or the less protective regulations of Jersey City, New Jersey.

As organizations that have for years fought to safeguard the landmarks of New York State and City, the New York Landmarks Amici have a demonstrable interest in the answer to this question. Ellis Island, the gateway to this nation for millions of Americans, is an irreplaceable part of New York's cultural heritage. It was originally a part of New York, and, Amici believe, the Compact's drafters intended for it to remain a part of New York. The Report's conclusions to the contrary are unsupported by the plain meaning of the Compact, contemporaneous construction of its terms, the record in this case, or relevant precedent. Its recommendations consequently must be rejected.

The New York Landmarks Amici possess a unique store of knowledge about historic preservation generally and the history of the New York City region in particular. Their experience in the area of historic preservation and local history will be helpful in the full presentation to the Court of the issues raised in this action. Their access to scholars familiar with and resources relevant to the history of the period will ensure that all factors of consequence are considered by the Court in assessing the Report's recommendations.

SUMMARY OF ARGUMENT

Article II of the Compact dictates, as New York ably argues, that New York has the "jurisdiction" of a "sovereign" over both the original and the landfilled portions of Ellis Island. Quite simply, Article II bestowed on New York jurisdiction that was coterminous with the entity of "Ellis Island" no matter how its physical boundaries might change

over time. It is on this basis, and this basis alone, that this case should be decided as a matter of compact construction. If the Court thinks otherwise, however, and deems it necessary to address Articles I and III of the Compact, it cannot do so on the basis of the Report's conclusions, for two alternative reasons.

First, the Report incorrectly equates "property," as used in Article III, with "sovereignty," a term which appears nowhere in the Compact. Notwithstanding Justice Holmes' dictum to the contrary in *Central Railroad Co. v. Jersey City*, 209 U.S. 473 (1908), no court or commentator at the time of the Compact would have found "sovereignty" in a mere "right of property," especially where, as was the case in Article III, the right at issue was no more than what the 1833 Commissioners would have understood as a *jus privatum* entitlement that had been expressly stripped of any *jus publicum* obligations or *jus regium* powers. Thus, while the Commissioners and their contemporaries may or may not have considered "jurisdiction" as always synonymous with "sovereignty," the Commissioners would never have equated "property" with "sovereignty." And it was for "property" rights, and "property" rights alone, that New Jersey settled in the Compact.

Second—and in the alternative—even if Article III did not give New York "sovereign" jurisdiction to the low water mark on the New Jersey shore, *at the very least* it gave New York "police power" jurisdiction over the same area. The Report, which confines itself to the "sovereign" effect of the Article I boundary line, never reaches this issue. It makes no attempt to define the scope of New York's residual (and facially "exclusive") jurisdiction on the New Jersey side of that boundary under Article III. The Special Master several times alludes to this jurisdiction as "limited," "legal," and, most significantly, as "police" jurisdiction. But the Report makes no effort to further circumscribe it, or determine its relationship to New Jersey's purportedly "sovereign" powers

over the waters and underwater lands in the vicinity of Ellis Island.

This omission is of particular significance to the New York Landmarks Amici because what the Report acknowledges to be New York's "police jurisdiction" on the New Jersey side of the Article I boundary line is, in the Amici's view, enough to give New York jurisdiction over, *inter alia*, planning, development and historic preservation matters on the New Jersey side of the boundary. All indications are, however, that New Jersey would not agree with this view of the scope of New York's residual powers. Hence, the Report's proffer of the Article I boundary as a full resolution of the dispute is far from such a full resolution. The Court must fill this gap in the Report's conclusions by affirmatively determining that New York has, *at the very least*, "police power" jurisdiction over the landfilled portions of Ellis Island.

POINT I

THE REPORT'S EQUATION OF "PROPERTY" AND "SOVEREIGNTY" IS WHOLLY UNTENABLE

This case should be decided, as a matter of compact interpretation, on the basis of Article II, and Article II alone. However, if the Court concludes otherwise and deems it necessary to examine Article III, it cannot adopt the Report's Article III conclusions because the equation of "property" and "sovereignty," on which the Report's Article III analysis is based, is wholly untenable. Article III granted to New York an "exclusive right of jurisdiction" over all the waters and the lands covered by such waters on the western side of the Hudson. New Jersey, by contrast, was granted only an "exclusive right of property" in the same subaqueous land, and it relinquished this ownership interest when it sold the landfilled areas to the Federal Government in 1904. If either of these rights can properly be equated with "sovereignty," it

is—as the State and City of New York argued before the Special Master—New York's "exclusive right of jurisdiction."

However, regardless of whether this Court is willing to equate "jurisdiction" with "sovereignty," there is no basis whatsoever for the Court to accept the Report's equation of New Jersey's "right of property" in the underwater lands around Ellis Island and "sovereignty" over those underwater lands. The plain meaning of Article III, which expressly distinguishes between all-inclusive "jurisdictional" and more limited "property" rights, does not permit such an equation. See Brief of Preservation Amici dated Mar. 25, 1996 (Docket No. 256). Nor—as Amici show below—would courts or commentators at the time of the Compact have found "sovereignty" in a mere "right of property," especially where, as was the case in Article III, the right at issue was no more than what the 1833 Commissioners would have understood as a *jus privatum* entitlement in underwater lands that had been expressly stripped of any *jus publicum* obligations or *jus regium* powers. This Court should not hold otherwise.

**A. ARTICLE III GRANTED TO NEW JERSEY
ONLY *JUS PRIVATUM* RIGHTS IN THE
UNDERWATER LANDS ON THE WESTERN
SIDE OF THE HUDSON RIVER**

Essential to understanding the nature of the "exclusive right of property" granted to New Jersey by Article III is a more general understanding of the meaning "rights of property" in "underwater lands" had for the Commissioners and their contemporaries in the 1820s and 1830s. The most compelling evidence of the meaning such terms had in this period is to be found in the language of the debate concerning rights in lands under navigable waters that was ignited by the New Jersey Supreme Court's 1821 decision in *Arnold v. Mundy*, 6 N.J.L. 1 (1821), and not resolved until this Court's decision in *Martin v. Waddel*, 41 U.S. 367 (1842). That

debate, which involved conflicting claims of title to the underwater lands in New Jersey's Raritan Bay, was well-known to Commissioners from New York and New Jersey who drafted the Compact, and necessarily affected their understanding of the "right of property" that Article III granted to New Jersey.

For many years prior to 1821, the Board of Proprietors of East Jersey had claimed title to all lands under water in the northern half of New Jersey. The Proprietors were among the successors in interest to Lord Berkeley and Sir George Carteret, the original grantees of what is now New Jersey, and purported to derive title to these underwater lands from Berkeley's and Carteret's 1664 grant from the Duke of York, which included, *inter alia*, "all rivers, harbours, waters, fishing, &c." in New Jersey. *Arnold*, 6 N.J.L. at 70. That grant had originally conferred both "soil" and "self-government" (*i.e.*, "property" and "jurisdiction") on Berkeley and Carteret, and thus on the Proprietors as their successors. *Id.* at 19. In 1702, however, the Proprietors—who had encountered difficulties governing the colony—ceded all rights of "government" back to the Crown, while purporting to retain their property rights in all the previously granted lands, including, the Proprietors believed, those lying under the navigable waters of the State. *Id.* at 27-29.

In 1821, however, the New Jersey Supreme Court held in *Arnold v. Mundy* that the lands under New Jersey's navigable waters belonged not to the Proprietors but to the State. The *Arnold* court concluded that such underwater lands, which in England had traditionally been the property of the Crown, had belonged to the Proprietors when they served as both the property holders and government of New Jersey, but had been ceded back to the Crown, as part of the *jura regalia*, in 1702. The State had succeeded to those rights after the Revolution, and consequently held the same

rights in the underwater lands that the King had held in such lands in England.

The State's authority over these lands, like those of the Crown, had three distinct aspects. It held the lands in fee simple (*jus privatum*), like any other individual, and could, arguably, make use of the lands as it desired. However, it could only make such use of the lands subject to the rights of the public (*jus publicum*) to use the waters above these lands for navigation and fishing. See Stuart A. Moore, *History of the Foreshore* 185-211 (1888). The *jus publicum* obligations with respect to the underwater lands "passed to the [State] as one of the royalties incident to the power of government," and it required the State to hold the lands as a "public trust for the benefit of the whole community" and to enforce this "public trust" through the use of its *jus regium* or sovereign regulatory powers. *Martin*, 41 U.S. at 413; *Arnold*, 6 N.J.L. at 77-78. As a result, the *Arnold* court concluded, such lands could not be sold or otherwise alienated by the State because the "sovereign power . . . cannot, consistently with the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common rights." *Arnold*, 6 N.J.L. at 78; see also *Martin*, 41 U.S. at 413; *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823); *Bell v. Gough*, 23 N.J.L. 624, 655-57 (1852); see generally *Idaho v. Coeur d'Alene Tribe*, No. 94-1474, 1997 WL 338603, at *17 (U.S. June 23, 1997); Richard D. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

Fearful of being compelled to forfeit interests in valuable underwater lands, the Proprietors contested the outcome in the *Arnold* case. The Proprietors accepted the view that the lands they claimed came encumbered with *jus publicum* obligations, but argued that the fee simple interest in such underwater lands could have been conveyed to the

Proprietors separate and apart from the *jura regalia* of government power. The *jus privatum* right of property, the Proprietors contended, could plainly be granted without *jus regium* powers to enforce the *jus publicum* trust in such lands. To make this argument, the Proprietors solicited opinions in 1824 from several prominent attorneys and jurists including Chancellor James Kent of New York and future New York Commissioner Peter Augustus Jay.

The opinions rendered on behalf of the Proprietors tell us much about contemporary understandings of property rights in "underwater lands." Most importantly, these opinions make clear that the "right of property" in lands under navigable waters was viewed by many (including at least one of the 1833 Commissioners) as independent of and wholly "unconnected with attributes of political power." In the words of Chancellor Kent:

The right of ownership of the soil in the navigable waters is not per se, an incident to sovereignty. It is not within the essential powers of government, because it is a right entirely subordinate to the jus publicum. It is not in the sense of the best English jurists, nor is it in the sense and practice of mankind, an incident and inseparable from royalty; and I am clearly convinced in my own mind . . . that the Proprietors of East Jersey were seized of the soil, and had a legal title to the land under tide waters at the time of their surrender of their powers of government to Queen Ann.

James Kent, *Opinion By Chancellor Kent of New York* (Dec. 16, 1824), reprinted in *East Jersey Proprietary Titles: Abstract of Title and Opinions of Chancellor Kent and E. Van Arsdale* 11 (1881) (emphasis added).

In his opinion, Peter Augustus Jay, the future New York Commissioner, was even more adamant in insisting that

"sovereign" and "proprietary" rights in underwater lands could be segregated:

It is proper to distinguish between the fee simple of the soil, and a right to exclusive use of it for all purposes. An individual may be seized in fee of the soil of a highway, yet the public have a right of passage over it; so the title to the soil of a fresh water river may be in one, and the right of fishing it in another. Almost all the arguments in [*Arnold v. Mundy*] tend to shew that use of navigable waters for various purposes is common to the public, but are inapplicable, (as it appears to me,) to the question in whom the fee simple of the soil is vested.

Id. at 2 (P.A. Jay, *Opinion* (Nov. 26, 1824)).

Viewed in light of the terms of this debate, which was not finally resolved until this Court's decision in *Martin v. Wadell* in 1842,² the only proper conclusion is that the "exclusive right of property" granted to New Jersey in Article III entailed no more than a *jus privatum* right in the underwater lands on the western side of the Hudson. The Commissioners and their contemporaries understood fully the distinction between *jus privatum* and *jus publicum* interests in underwater lands, they used the term "property" to denote *jus privatum* rights and the term "jurisdiction" to denote *jus publicum* obligations as enforced by *jus regium* powers, and they viewed these rights as conceptually segregable even if, for purposes of the ongoing debate, certain of the

² In *Martin*—ten years after the Compact—the Court adopted the *Arnold* holding that lands under navigable waters were held "as a public trust for the benefit of the whole community," 41 U.S. at 413, and thereby laid the groundwork for later case law permitting alienation of such lands (and thus severance of *jus privatum* and *jus publicum* interests) upon satisfaction of a public interest standard. See *Coeur d'Alene Tribe*, 1997 WL 338603, at *17; Lazarus, *supra*, at 633-44 (tracing evolution of "public trust" doctrine).

Commissioners' contemporaries might have been unwilling to concede that the rights were entirely severable.

This distinction and terms that would be used consistently to discuss it had become part of the dialogue between New York and New Jersey as early as 1807. In one of the Propositions submitted by the New Jersey Commissioners to their New York counterparts during the first round of negotiations that year, New Jersey acknowledged that "[a]rms of the sea and navigable rivers are subject to a *jus publicum*, a *jus privatum*, and a *jus regium*." (NJ Ex. 213.) In another Proposition, New Jersey explained the bases for its claims to New York Harbor and the Hudson River in the following terms:

[T]he King of Great-Britain possessed, not only the *property* in all navigable rivers, but by his prerogative, claimed and exercised (among his *regalia*) *jurisdiction* over them, and over all shores below high water mark, and over all ports and harbors whatsoever within his American colonies. It is therefore evident that if the grant to the first settlers of New-Jersey, had contained an express limitation to high water mark, it would only follow that the *property* as well as the *jurisdiction* over the subject matter now in controversy was retained by the duke and again resulted to the crown when he became king of England, and would be no more than if the crown had retained originally the *property & jurisdiction* of a large lake in the centre of New-Jersey.

(NJ Ex. 209 (emphasis added).) The New Jersey Commissioners went on to contend that the rights thus retained by the Crown devolved upon New Jersey after the Revolution. However, what matters is not the validity of New Jersey's claims, but the fact that it framed these claims in terms of two distinct rights, "property" and "jurisdiction," which, for the reasons set forth above, can be equated with

jus privatum rights and *jus publicum* obligations as enforced by *jus regium* powers.³

The terms of the dialogue would not change significantly in the ensuing twenty years. In 1828, New Jersey was still expressing concerns about New York's "ownership and jurisdiction up to [New Jersey's] very shores," setting forth distinct bases for its claims to both "property" and "jurisdiction" in the Hudson River, and contending for "equal and concurrent rights over the Hudson" and "property rightfully extend[ing] to the middle of that river." (NJ Ex. 273, at 10; NJ Ex. 278, at 40, 44.) Similarly, in its 1829 Bill in this Court, New Jersey's repeated refrain was for "property, sovereignty, and jurisdiction," with the Bill's only efforts to distinguish among these rights suggesting that "sovereignty" could not be differentiated from "jurisdiction" and that "property" was something that the State could hold in the

³ That there were always two interests in these underwater lands at issue is also evidenced by the terms of the 1804 dispute between the Associates of the Jersey Company and the Corporation of the City of New York that is referenced in several of the Commissioners' reports. (NJ Ex. 272, at 6-7.) Concerned that the City of New York might claim some interest in the underwater lands adjacent to Powles Hook (now Jersey City) on which it planned to build wharves and piers, the Jersey Company retained Alexander Hamilton to evaluate both New York City's "property" and "jurisdictional" claims to these lands. Hamilton declined to opine concerning the "jurisdictional" claims, but he had no doubts that "the Corporation of the City of New York have no right of soil in or title to the land, under the water to and adjoining Powles Hook." 26 *The Papers of Alexander Hamilton* 221, 224, 227-31 (Harold C. Syrett et al. eds., 1961-79). Attorneys later retained by the City of New York agreed with Hamilton's conclusion as to the City's lack of property rights, but believed that the State had both property and jurisdictional rights in these lands, and ultimately persuaded the New York Attorney General to bring a suit that was litigated for years afterwards with inconclusive results. 3 *Minutes of the Common Council of the City of New York, 1675-1776*, at 520-23, 552, 693-94, 712-13 (1905); see also Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, at 115-16 (1983).

same manner as an individual, and therefore, a mere *jus privatum* right. (NJ Ex. 293, at 26 (contending that historically "no right of property existed or could exist" in the Hudson River, as demonstrated by the fact that "all the ancient grants made by the Duke of York to individuals while he remained Duke . . . [were] limited to the low-water mark" on the New York side of the river).)

In light of contemporaneous understandings of the rights at issue and the terminology of the longstanding dialogue between the States, the terms of compromise reached in 1833 appear unambiguous. New Jersey had sought both "property" and "jurisdiction" in the lands under the waters dividing the states, with a full understanding of the distinction between these two rights. It settled for a mere "property" right, with none of the trappings of "jurisdiction." If granted, the right of "jurisdiction" would have given New Jersey both the *jus privatum* rights of a private owner and the *jus publicum* obligations of a sovereign in these underwater lands. However, it was not granted. Instead, "exclusive jurisdiction," and therefore the obligation to use *jus regium* powers to protect *jus publicum* rights, were expressly left in the hands of New York.⁴

Much as the New Jersey Proprietors had ceded the "right of government" back to the Crown in 1702 in exchange for a

⁴ The agreement reached in the Compact of 1834 with respect to underwater lands is to be contrasted with the agreement reached between New York and Massachusetts in the earlier Hartford Compact. In the Hartford Compact, which this Court addressed in *Massachusetts v. New York*, 271 U.S. 65 (1926), "property rights" in "underwater lands" were not expressly mentioned, so the Court invoked the presumption that any rights not expressly granted by a sovereign are retained by the sovereign to hold that lands under Lake Ontario, in which Massachusetts claimed a proprietary interest, remained the property of New York by virtue of its retention of jurisdiction over the Lake. *Id.* at 90. Here, by contrast, "property" and "jurisdictional" rights in underwater lands are expressly segregated, and should be so regarded by this Court.

continued "right of property" in lands granted to them by the Duke of York, New Jersey's 1833 Commissioners allowed New York to retain the power of governmental jurisdiction over the underwater lands on the western side of the Hudson in exchange for an "exclusive right of property" in the same lands. That right, which Article III expressly strips of any jurisdictional powers, cannot be construed any more broadly than the property rights of the Proprietors after their 1702 renunciation of the "right of government."⁵

**B. *JUS PRIVATUM* RIGHTS OF
PROPERTY HAVE NEVER BEEN
EQUATED WITH SOVEREIGNTY**

Accepting that Article III granted to New Jersey no more than a *jus privatum* right of property in the waters and underwater lands west of the middle of the Hudson River undermines entirely the Report's conclusion that New Jersey's "exclusive right of property" must be equated with "sovereignty" over those waters and underwater lands. The *jus publicum* obligation, with its correlative *jus regium* power of enforcement, constitutes the authority of a sovereign. *Jus privatum* rights, by contrast, are not the equivalent of

⁵ This is not to say that New Jersey did not attribute great value to the rights it obtained under Article III. By virtue of Article III, New Jersey acquired title to property that could generate revenues in two ways: by sale for future filling and development, and for use as "Oyster grounds." With respect to the former, Peter Augustus Jay, in the Opinion he rendered on behalf of the Proprietors in 1824, acknowledged that a *jus privatum* right in underwater lands could have value notwithstanding *jus publicum* limitations on its use because "if the soil is private property, then no one can, without the consent of the owner, erect upon it wharves, mill-dams or other erections." Opinion of P.A. Jay, *supra*, at 3. As to the latter, one contemporary source suggests that New Jersey's interest in a "right of property" in the Hudson River and New York Bay was chiefly provoked by a desire to control the valuable "Oyster grounds" in those waters. Letter from John Rutherford to Peter D. Vroom dated June 10, 1832 (Southard Papers, Princeton University).

sovereignty, and no court or commentator, at the time of the Compact or since, has held otherwise.

In the understanding of the 1820s and 1830s, the distinction between the state as a sovereign and the state as a private property holder was well-established and fully appreciated. Indeed, Vattel, Chancellor Kent, and other commentators readily acknowledged that a "sovereign" could hold property like an individual, but, in the same instant, observed that such proprietary activities were wholly independent of its powers as a sovereign. See, e.g., Emmerich de Vattel, *The Law of Nations*, bk. II, § 83 (1792) ("[M]any sovereigns have fiefs, and other properties, in the lands of another prince; and they therefore possess in the manner of individuals."). The decisions of this Court, at the time of the Compact and since, reflect a similar understanding of the distinction between a government's "sovereign" and "proprietary" activities. See *The Santissima Trinidad*, 20 U.S. 283, 353 (1822) (recognizing that a sovereign may "hold a private domain within another territory"); *City of Hoboken v. Pennsylvania R.R.*, 124 U.S. 656 (1888) (distinguishing between the "public easement of access to navigable waters," which "inheres in the state in its sovereign capacity," and the "title of the state in land under tide-waters" which is "strictly proprietary").

The Commissioners in the 1833 negotiations shared fully this understanding of the distinction between a sovereign entity's "sovereign" and more limited "proprietary" activities. Indeed, the 1807 New Jersey Commissioners, among whom was future 1833 Commissioner James Parker, had cited Vattel in one of their letters to their New York counterparts for the proposition that "the empire of a country and the property in its soil are not inseparable," and that therefore, "nothing prevents the possibility of property belonging to a nation in places not under its obedience." (NJ Ex. 209, at 43 (citing Vattel, *supra*, § 43).)

On the New York side of the table, both Peter Augustus Jay and Benjamin F. Butler, had confronted this distinction more than once in dealing with the affairs of the Corporation of the City of New York, an entity whose property-holding powers were as important as and, in an age of increasing regulatory activity, sometimes difficult to distinguish from its governmental or jurisdictional powers. See generally Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (1983); see also Elizabeth Blackmar, *Manhattan for Rent, 1785-1850* (1989).

Thus, in *Mayor of New York v. Slack*, 3 Wheel. Cr. Cas. 237 (N.Y.C.P. 1824), Jay, who often represented the Corporation in the 1820s, had a part in persuading a New York court to hold that "in respect to a corporation invested with the local government of a place, a distinction is to be made between its capacity for holding and transferring property, and its capacity to legislate for the good of the place with whose government it is invested." *Slack*, 3 Wheel. Cr. Cas. at 258-59. As a property holder, the sovereign entity could buy, hold and sell property like an individual, and be bound by the property-holding obligations of an individual, but these obligations were distinct from and always trumped by its obligations to use its entirely distinct "legislative power" for the public good.⁶

⁶ Among the properties held by the Corporation of the City of New York in its "proprietary" role were the underwater lands bordering lower Manhattan (to a distance of 400 feet from the shore) that had been conveyed by the City to individuals in "waterlot grants" since the late 17th century. See Hartog, *supra*, at 44-59. In the Opinions rendered on behalf of the New Jersey Proprietors in 1824, both Chancellor Kent and Jay pointed out that these underwater lands—like those granted to New Jersey by Article III—had been granted to the City as "property," and not as part of any sovereign prerogative. See Opinion of Chancellor Kent, *supra*, at 14; Opinion of P.A. Jay, *supra*, at 7.

Butler recognized the same distinction, with the same effect, in rendering an opinion in January 1834 as to whether the Corporation of the City of New York could grant a license for a second ferry to Brooklyn:

The authority to establish ferries granted to the city by the charter, is a branch of the sovereign power, and like all the other legislative and administrative powers conferred on them, was granted to the Corporation "*for the good rule and government of the City,*" and *not as a subject of property*. In this respect, it is to be carefully distinguished from the express grant of the Old Ferry, contained in the first charter, and subsequently confirmed. *The franchise of keeping up that ferry for ever, is granted to the Corporation as an incorporeal hereditament, to be held by them on the same tenure as if the same had been granted to an individual. They have a freehold property in it.* But the general power to establish other ferries is delegated to them as depositories in this respect of the prerogative of the government.

All the Proceedings in Relation to the New South Ferry between the Cities of New York and Brooklyn from December 1825 to January 1835 (1835) (emphasis added).

It is this same distinction between "sovereign" and "proprietary" rights, so familiar to the Commissioners and their contemporaries, that is embodied in the Compact's grant of *jus privatum* rights to New Jersey in underwater lands with respect to which New York retained *jus publicum* obligations and *jus regium* powers. By settling for an "exclusive right of property" in lands expressly subject to New York jurisdiction, New Jersey accepted what Vattel called "fiefs, and other properties, in the lands of another prince," and New Jersey cannot now be held to "possess" such lands other than

"in the manner of [an] individual." Vattel, *supra*, at bk. II, § 83.

Subsequent courts have so held. See *State v. Babcock*, 30 N.J.L. 29, 31 (1862) ("New Jersey is bounded by the middle of the Hudson river, and *the state owns the land under the water to that extent*," with "exclusive jurisdiction" retained by New York) (emphasis added); *Kiernan v. The Norma (The Norma)*, 32 F. 411 (S.D.N.Y. 1887) ("[T]he state of New Jersey has nothing more than the mere right of property,—the naked legal title."); see also *People v. Central R.R.*, 42 N.Y. 283, 312 (1870) (Earl, J. dissenting) ("By this provision simply *property* is given to New Jersey, and the governmental jurisdiction and authority of New York is not interfered with.").

New Jersey cannot claim more now. It was property rights, and property rights alone, that New Jersey bargained for and obtained in Article III. The Report's conclusions to the contrary must consequently be rejected.

POINT II

IN THE ALTERNATIVE, THE COURT SHOULD AFFIRMATIVELY DETERMINE THAT ARTICLE III GRANTED TO NEW YORK, AT THE VERY LEAST, "POLICE POWER" JURISDICTION ON THE NEW JERSEY SIDE OF THE ARTICLE I BOUNDARY LINE

Should the Court conclude that neither Article II nor Article III gives New York full "sovereignty" over all of the current Ellis Island, it should alternatively determine that Article III left to New York, *at the very least*, "police power" jurisdiction over all of the Hudson River's waters and underwater lands, including the landfilled portions of Ellis Island. The Report, which confines itself to the "sovereign" effect of the Article I boundary line, never reaches this issue. It makes no attempt to define the scope of New York's residual (and facially "exclusive") jurisdiction on the New

Jersey side of that boundary under Article III. The Special Master several times alludes to this jurisdiction as "limited," "legal," and, most significantly, as "police" jurisdiction. (R. at 57, 65, 67, 76, 78.) But the Report makes no effort to further circumscribe it, or determine its relationship to New Jersey's purportedly "sovereign" powers over the waters and underwater lands in the vicinity of Ellis Island or at any other point along the boundary line's more than twenty-mile length. The Court must fill this gap in the Report's conclusions, by affirmatively determining that New York has, *at the very least*, "police power" jurisdiction over the landfilled portions of Ellis Island.

**A. AT THE VERY LEAST, NEW YORK RETAINED
UNDER ARTICLE III BROAD REGULATORY
POWERS OVER THE WATERS AND UNDERWATER
LANDS OF THE HUDSON RIVER**

If New York did not retain "sovereign" jurisdiction over the whole of the Hudson River under Article III, it did retain, *at the very least*, jurisdiction over a broad array of regulatory matters affecting both the waters and underwater lands of that river. Such regulatory powers, contemporaneous evidence shows, are the least that the New York Commissioners bargained for in the 1833 negotiations and what both the New Jersey Commissioners and subsequent commentators and case law concede New York retained in the Compact.

The New York Commissioners set forth what they believed they had secured for New York in an October 20, 1833 letter to New York Governor William L. Marcy:

[W]e trust that the jurisdiction necessary for the health, improvements, and police of that City has been amply secured, and that the agreement herewith delivered to you will be satisfactory to the legislature and to our fellow-citizens generally.

(NJ Ex. 312 (emphasis added).) This post-negotiation account of New York's objectives accords with the assurances offered by Benjamin F. Butler, the lead New York Commissioner, to fellow Commissioner Peter Augustus Jay in March 1833, that "what is due to *the commerce, health, police and improvements of your city . . . [is] to be carefully considered in the propositions we may submit or receive.*" Letter from Butler to Jay quoted in John Jay, *Memorials of Peter A. Jay: Compiled for his Descendants* (1929) (emphasis added).⁷

It also accords with what the New Jersey Commissioners conceded as early as 1827 New Jersey was willing to relinquish to New York:

In terms of settlement submitted by your commissioners, they endeavored to remove any just ground of exception, by *yielding to New-York exclusive jurisdiction over the adjoining waters in several important matters, which the health and commercial welfare of the city of New-York seemed to require.*

(NJ Ex. 273, at 10 (emphasis added).) It is also what Justice Lucius Q.C. Elmer, one of the New Jersey Commissioners, acknowledged years later had, at a minimum, been retained by New York in Article III:

It being suggested on behalf of New Jersey, that, waiving all considerations of abstract right, New York should acknowledge the true boundary line to be the middle of the river, and that New Jersey should agree

⁷ Butler's statements to Jay in early 1833 also accord with statements Butler made to 1828 New Jersey Commissioner John Rutherford in June 1832, to the effect that New York had no interest in the "Oyster grounds" of New York Bay (*i.e.*, property rights) but was "anxious for some regulation relative to quarantine and jurisdiction near the city of New York." Letter from Rutherford to Peter D. Vroom dated June 10, 1832 (Southard Papers, Princeton University).

that *New York should have all such rights west of that line as might be deemed important to secure to that State the right to regulate the police and the quarantine on the whole of the waters dividing the States*; this proposition, after time had been taken for full consideration and consultation, was acceded to by the New York commissioners.

Lucius Q.C. Elmer, *The Constitution and Government of the Province and State of New Jersey* 459 (1872) (emphasis added); see also *State v. Babcock*, 30 N.J.L. 29, 33 (1862).

Subsequent case law has described the rights and powers retained by New York in comparable terms. Thus, in the 1870 *Central Railroad* case, the New York Court of Appeals concluded that Article III granted to New York a "police jurisdiction" for the "protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York." *People v. Central R.R.*, 42 N.Y. 283, 300 (1870). Later cases have followed suit. See *Ferguson v. Ross*, 27 N.E. 954 (N.Y. 1891) ("the purpose of vesting exclusive jurisdiction over these waters in the state of New York was to promote the interests of commerce and navigation"); *Ross v. Mayor of Edgewater*, 180 A. 866, 870 (N.J. 1935) (Article III permitted New York to retain "a general police jurisdiction, for the promotion of the interests of commerce and navigation, over the waters of the bay and river to the low-water mark of the New Jersey shore"), *aff'd*, 184 A. 810 (N.J.), *cert. denied*, 299 U.S. 543 (1936); *Tennant v. State Bd. of Taxes and Assessments*, 113 A. 254 (N.J. 1921) ("this jurisdiction has been held by the courts of both New York and New Jersey to be a jurisdiction simply for the exercise of the police power").

**B. THE BROAD REGULATORY POWERS
RETAINED BY NEW YORK UNDER
ARTICLE III ARE SYNONYMOUS
WITH THE "POLICE POWER" OF
STATE AND LOCAL GOVERNMENTS**

The broad powers that all parties thus concede were retained by New York under Article III are synonymous with what this Court has since come to recognize as the "police power" of state and local governments. In fact, the "police power" doctrine had its origins in the same period as the Compact, and was being vigorously debated in this and other courts during the years when New York and New Jersey were moving toward a resolution of their boundary dispute. See William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061 (1994). The terms of that debate, and the scope of the evolving doctrine, are echoed in what the Commissioners and others described at the time as the powers New York retained under Article III.

This crossover between the developing "police power" case law and the Compact is not surprising for a number of reasons, not the least of which is the fact that Peter Augustus Jay, the New York Commissioner with the greatest interest in the "commerce, health, police and improvements" of New York City, represented the Corporation of the City of New York in a trio of cases in the early 1820s, the so-called "cemetery cases," that legal scholars acknowledge laid the groundwork for much subsequent "police power" jurisprudence.⁸ See *Mayor of New York v. Slack*, 3 Wheel.

⁸ The "cemetery cases" concerned the validity of a New York City ordinance prohibiting burials in cemeteries the City had granted to various New York City churches more than a century before. The religious groups made a variety of arguments based on vested rights and real property theories while the City, represented by Jay, argued that the

Cr. Cas. 237 (N.Y.C.P. 1824); *Corporation of the Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538 (N.Y. Sup. Ct. 1826); *Coates v. Mayor of New York*, 7 Cow. 585 (N.Y. Sup. Ct. 1827); see generally Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (1983); Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 565 (1904); Christopher Tiedemann, *A Treatise on the Limitations of the Police Power in the United States* 427, 583 (1886); Thomas M. Cooley, *A Treatise on Constitutional Limitations* 127, 206-7, 283, 595 (1868); 2 James Kent, *Commentaries on American Law* 274-76 (1826-30).

The holdings of the New York courts in the "cemetery cases" are echoed in various contemporaneous and later "police power" cases in this Court. In these cases, the main inquiry is the line between state and federal power, but in pursuing this inquiry, the Court often found itself compelled to define the scope of the powers that are left to the states. In doing so, it circumscribed the powers reserved to the states in the same broad terms that contemporaneous accounts describe the powers that New York retained under Article III.

Most interesting in this respect are *Gibbons v. Ogden*, 22 U.S. 1 (1824), *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829), and *Mayor of New York v. Miln*, 36 U.S. 102 (1837). All three of these cases examined the scope of the "police power" in the context of the development,

statute entailed a legitimate exercise of the City's power to enact "police regulations." *Coates v. Mayor of New York*, 7 Cow. 585, 597-601 (N.Y. Sup. Ct. 1827) (Argument of P.A. Jay). The New York court upheld the City ordinance as validly targeted at the "health, welfare and improvement" of the City, and therefore, among the array of regulations properly categorized as "police regulations." See *Slack*, 3 Wheel. Cr. Cas. at 243-45, 249-52 (enumerating the many areas in which New York City had validly legislated for the public good).

maintenance and management of rivers, harbors and underwater lands—the same setting that it was contemplated New York would exercise the "exclusive jurisdiction" retained by it in Article III. In so doing, these cases confirm that what the Commissioners believed New York had retained in Article III can properly be equated with what this Court was coming to define, with ever greater specificity, as the "police power."

Gibbons, with which the Commissioners and their contemporaries were undoubtedly familiar, concerned the federal power to regulate commerce and navigation in interstate navigable waterways like the Hudson River. In *Gibbons*, Chief Justice Marshall mapped out the contours of most commerce clause and police power jurisprudence to come, and, in so doing, left to the states precisely the powers over New York's rapidly developing harbor that the New York Commissioners retained for New York in Article III—"that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all of which can be most advantageously exercised by the States themselves," including "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c." 22 U.S. at 203.

Willson confirmed that the filling and improvement of underwater lands, like those over which Article III gave New York "exclusive jurisdiction," was within the "police power" of the States. Confronted with a "commerce clause" challenge to a Delaware statute authorizing the erection of a dam across a coastal creek, the Court looked to the object and likely effect of the legislation and found that "the value of the property on its banks must be enhanced . . . and the health of the inhabitants probably improved." 27 U.S. at 251. Without clear indication that any issue of federal concern was

implicated, this Court upheld the challenged statute, concluding that "[m]easures calculated to produce these objects [i.e., the filling and improvement of underwater lands], provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." *Id.* at 251. The Commissioners on both sides of the 1833 negotiating table—on the basis of over a century of landfilling in New York Harbor—also believed that the power to authorize improvements of underwater lands was in the States, and by the terms of Article III, expressly reserved this power (to the extent that the underwater lands were not immediately contiguous to the New Jersey shore) to New York.

Miln expanded the scope of the police power still further, to permit the States to regulate with respect to all matters that were essential to "the health and commercial welfare" of the community. In *Miln*, this Court upheld a New York statute requiring masters of vessels arriving in the same New York Harbor with which the Compact dealt to report the names of foreign passengers. It did so, in part, by looking to a broadly-worded *Federalist* pronouncement that "the powers reserved to the several states, will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement and prosperity of the state." 36 U.S. at 133 (quoting *The Federalist* No. 45).

In a passage that echoes clearly the words of the Commissioners concerning what New York had retained in Article III, this Court held in *Miln* that the states have "undeniable and unlimited jurisdiction" to "advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which [they] may deem to be conducive to these ends." *Id.* at 139. The "undeniable and unlimited jurisdiction" that this Court thus expressly reserved to the States is no different

from the narrowest reading of the "exclusive right of jurisdiction" at issue in Article III, which the New York Commissioners told New York's Governor in October 1833 had been "secured" for New York and was "necessary for the health, improvements, and police" of New York City. (NJ Ex. 312.)

**C. THE "POLICE POWER" JURISDICTION RETAINED
BY NEW YORK UNDER ARTICLE III GIVES IT
CURRENT JURISDICTION OVER HISTORIC
PRESERVATION MATTERS ON THE NEW JERSEY
SIDE OF THE ARTICLE I BOUNDARY**

The "police power" jurisdiction that, at a minimum, New York retained in Article III gives it current regulatory control over many matters, including historic preservation issues, on the New Jersey side of the Article I boundary. The already expansive definition of the "police power" developed by the time of the Compact expanded still further throughout the 19th and into the 20th century. The measures required to address the "health, welfare and improvements" of the community grew more numerous as society grew more complex, and this Court, with consistent flexibility, repeatedly lengthened the list of subjects properly subject to the "police power." Under its Article III grant, New York is now entitled to exercise jurisdiction on the New Jersey side of the boundary line (including on the landfilled portions of Ellis Island) over all these subjects.

**1. *The Scope of the "Police Power"*
Jurisdiction Retained By New York
Under Article III Has Expanded
*Since Execution of the Compact***

The scope of the "police power" doctrine has expanded significantly since execution of the Compact. As a result, the distinct powers contained in the "police power," or which may exist beyond its scope, have grown less and less

susceptible of precise or exhaustive definition. In 1911, Justice Holmes could describe the "police power" as "extend[ing] to all the great public needs [and] . . . be[ing] put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911). By 1954, its parameters had grown broader still, provoking Justice Douglas to observe that the "purposes" served by the "police power" are "neither abstractly nor historically capable of complete definition." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

What is clear, however, is that in the years since the Compact, this Court has upheld a broad array of social and economic regulation under the rubric of the "police power," in the face of challenges that these regulations violated vested property rights. See generally William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L. J. 1061 (1994); Maureen Kordesh, "I Will Build My House With Sticks": *The Splintering of Property Interests Under The Fifth Amendment May Be Hazardous To Private Property*, 20 HARV. ENV. L. REV. 397 (1997); see also Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (1904).

Most significantly for this case, the "police power" has become the bedrock upon which historic preservation law has developed. In a line of cases commencing with *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and running through *City of Boerne v. Flores*, No. 95-2074, 1997 WL 345322 (U.S. June 25, 1997), this Court has consistently looked to state "police power" to validate regulations concerned with historic and aesthetic land-use and zoning issues. In *Euclid*, the Court upheld a zoning ordinance prohibiting commercial development in a residential area, concluding that "[t]he ordinance now under review, and all

similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare." *Id.* at 387-88.

Historic preservation law came into its own when the Court similarly invoked the "police power" to uphold land-use controls based on aesthetic considerations in *Berman v. Parker*. In *Berman*, the question raised was whether the District of Columbia could raze a salvageable building in a deteriorating neighborhood as part of an aesthetically-driven urban renewal plan. Looking to the broad scope of the "police power," Justice Douglas answered on behalf of the Court with a resounding yes, concluding that "[i]t is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33.

All doubt as to whether historic preservation regulation was within the scope of government police power was dispelled by the Court's 1978 decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Specifically, the Court held that restrictions imposed by New York City's Landmarks Preservation Law on New York's Grand Central Station did not effect a taking of the property in violation of the Fifth Amendment. In upholding the New York law, the Court explicitly dismissed the idea that aesthetic considerations alone are not a proper basis for the exercise of the government's police power. To the contrary, the *Penn Central* court affirmatively concluded that—on the basis of the "police power"—a state could constitutionally promote historic preservation goals because such goals undoubtedly served the public interest.

**2. *New York Is Entitled To Exercise
Jurisdiction To The Full
Extent of The "Police Power"***

New York is entitled to reap the benefits of the expanded scope of the "police power" by being permitted to use its Article III jurisdiction to regulate with respect to, *inter alia*, historic preservation matters on New Jersey's side of the Hudson. This is the case for two separate sets of reasons. *First*, to the extent that the Compact is construed as a contract, such a construction accords with the intent of its drafters, and should be given effect. See *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (compacts are construed as both contracts and statutes); *Massachusetts v. New York*, 271 U.S. 65 (1926) (object of compact interpretation is construction in accordance with contemporaneous expectations). The jurisdiction that New York retained in Article III reaches at least as far as controls on such "improvements" of the underwater lands surrounding Ellis Island as were within the contemplation of the 1833 Commissioners. In the 18th and 19th century, the Corporation of the City of New York imposed on the recipients of "waterlot grants" parameters for development with zoning-like specifications that included exact street dimensions and development timetables. See Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, at 44-59 (1983) (discussing terms of 18th Century waterlot grants). The New York Commissioners, who were familiar with the terms of such waterlot grants, would have expected New York to have at least this measure of control over the development of the underwater lands surrounding Ellis Island, and, translated into contemporary terms, this means that New York's historic preservation regulations

should apply to the landmark structures on both the "original" and landfilled portions of Ellis Island.⁹

Second, to the extent that the Compact is construed, as it properly may be, as a federal statute, the rights that New York obtained in the bargain it struck with New Jersey in 1833 are no different from the rights conferred by other federal statutes. This Court has repeatedly expanded the scope of the rights and protections derived from such sources to adapt to changed circumstances, so there is no reason that the "police power" conferred by Article III should not be interpreted in similarly contemporary terms. *See Diamond v. Chakrabarty*, 447 U.S. 303 (1980) ("This Court frequently has observed that a statute is not to be confined to the 'particular application . . . contemplated by the legislators.'"); *Barr v. United States*, 324 U.S. 83 (1945) ("If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."); *see, e.g., United States v. Johnson*, 994 F.2d 980, 986 (2d Cir.) (construing statute ceding land to Federal

⁹ To the extent any uncertainty exists as to the scope of the powers the Commissioners contemplated for New York, New York should be given the benefit of the doubt and acknowledged to hold any powers not expressly granted to New Jersey. Grants from sovereign to subject or another sovereign have traditionally been interpreted most strongly against the grantee. *See United States v. Oregon*, 295 U.S. 1, 14 (1935); *Massachusetts v. New York*, 271 U.S. 65, 89 (1926); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 91 N.E. 846, 847 (N.Y. 1910), *aff'd* 229 U.S. 82 (1913). Here, this presumption operates against New Jersey, since it was New York who had acknowledged sovereignty over the whole of the Hudson until 1833, and was thus parting with a measure of its sovereign jurisdiction in Article III. Thus, any ambiguity as to the meaning of Article III's "exclusive right of jurisdiction" in "lands covered by said waters" must be construed against New Jersey and in New York's favor to include all past and present rights not expressly granted to New Jersey by the Compact.

Government for naval purposes so as to avoid "a rigid interpretation of antiquated deeds that did not fully anticipate the complex development of naval operations"), *cert. denied*, 510 U.S. 959 (1993). The Court should do the same here by interpreting the "exclusive right of jurisdiction" left to New York by Article III to extend to the entire array of regulatory powers ordinarily exercised by a state, including the power to police the preservation of Ellis Island as a national landmark.

CONCLUSION

The Court should conclude that New York has sovereign power over Ellis Island by virtue of Article II, and Article II alone. If the Court proceeds further and turns to Article III, it must reject the Report's Article III conclusions because the Report's equation of "property" and "sovereignty" is wholly untenable. In the alternative, should the Court determine that neither Article II nor Article III gives New York sovereignty over Ellis Island and the western half of the Hudson, it should determine that New York has, *at the very least*, "police power" jurisdiction over these areas.

Dated: New York, New York

July 30, 1997

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE IN SUPPORT OF THE
EXCEPTIONS OF THE STATE OF NEW
YORK AND BRIEF OF AMICI CURIAE**

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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**MOTION OF NATIONAL TRUST FOR HISTORIC
PRESERVATION AND MUNICIPAL ART SOCIETY
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

Pursuant to Rule 37 of the Rules of this Court, the National Trust for Historic Preservation in the United States, and the Municipal Art Society of New York ("Amici") respectfully move for leave to file the accompanying brief as *amici curiae* in support of the Exceptions of the State of New York to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R."). The State of New York has consented to the filing of this Brief. The consent of the State of New Jersey has been requested and refused.

Amici are national and local organizations dedicated to historic preservation. This action concerns whether the State of New York or the State of New Jersey has "sovereign" jurisdiction over Ellis Island. The dispute turns on the interpretation of the terms of a compact entered into between

New York and New Jersey in 1834 concerning their Hudson River/New York Harbor boundary (the "Compact"), and the course of conduct of the two States and the Federal Government with regard to this boundary in the ensuing century and a half.

The National Park Service, as the Report recognizes (R. 8-9), currently holds legal title to and exercises exclusive jurisdiction over Ellis Island. So long as that remains the case, the Island's historic sites and buildings will remain subject to a single and responsible preservation program, as required by federal law. Federal law will govern preservation of these sites and buildings and federal officials will ensure that these laws are effectively implemented. If, however—in the scenario envisioned by the Special Master—the Federal Government were to relinquish control of all or part of the Island and the Report's "split sovereignty" remedy were adopted, the integrity of Ellis Island's historic character would be in jeopardy. Thus, this action, and the result recommended by the Report, raise issues as to whether the landmark buildings of Ellis Island can be adequately protected if sovereignty over the Island is divided between New York and New Jersey.

Amici possess a unique store of knowledge about historic preservation generally and Ellis Island in particular, and can offer a distinct perspective on the landmark preservation issues raised in this case:

NATIONAL TRUST FOR HISTORIC PRESERVATION

The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 as a private not-for-profit organization to facilitate public participation in the preservation of our nation's historic resources. 16 U.S.C. § 468. The National Trust's mission is to provide leadership, education, and advocacy to save America's diverse historic places and revitalize our communities. With more than 280,000 individual

members throughout the country, including 25,000 members in New York and 11,000 members in New Jersey, the Trust has a vital interest in safeguarding the integrity of local historic preservation ordinances as essential tools to encourage the preservation of significant historic, cultural and aesthetic resources. To that end, the National Trust has participated in more than 100 cases of local, state and national importance in the last 25 years, including 5 cases involving the interpretation and enforcement of the New York City Landmarks Preservation ordinance.

THE MUNICIPAL ART SOCIETY OF NEW YORK

The Municipal Art Society of New York is a 105-year old civic organization dedicated to improving the physical environment of New York City and the quality of its urban life through planning and preservation. The Society has several thousand members. Its efforts over the years led to the creation of New York's first zoning ordinance, air quality and noise controls, as well as the establishment of the New York City Planning Commission and the New York City Landmarks Preservation Commission. As a constant advocate for careful planning and the preservation of the great structures, spaces and historic districts of the city throughout its history, the Society has often participated as an *amicus curiae* in cases regarding landmarks issues, including appearances before this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *City of Boerne v. Flores*, No. 95-2074, 1997 WL 345322 (U.S. June 25, 1997).

As organizations dedicated to the preservation of landmarks, Amici also have a significant interest in the outcome of this litigation. Few landmarks have touched the lives of more Americans than Ellis Island. Ellis Island forms an integral ensemble of historic buildings, and it should be

treated as such, subject to a single set of preservation laws and comprehensive preservation planning and administration. Any other solution would, if the Federal Government relinquished control over Ellis Island, raise issues of administrative impracticality, frustrate effective preservation and planning on the Island, and likely result in the dispute reappearing in this Court.

It would also ignore the symbolic significance of the Island. This Court cannot turn the clock back to 1834, when only a small fort stood on a much smaller Island. It should look at Ellis Island, as it exists today, after a federal presence of more than a century, and in the context of the "immigrant" experience that has transformed a federal installation into an icon of American history and culture and a unit of the National Park System. It should recognize that it is Ellis Island as a whole, and not just its individual buildings, that is etched into the memories of millions of Americans as the Gateway to America. The Island's buildings *could*, as the Report recommends, be partitioned; the memories of millions of Americans *should* not be.

Amici are in a unique position to fully present the various aspects of these important issues to the Court. Amici participated at trial and in summary judgment and post-trial briefing before the Special Master,¹ see Docket Nos. 256 & 368, and offer in the accompanying brief precisely what they have offered throughout the course of these proceedings, *i.e.*, to "bring to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. Rule 37.1. The issue of landmark preservation is, as the Special

¹ Amici participated in the proceedings before the Special Master in an amicus group that also included the New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council. These latter organizations are filing a separate Brief in support of the Exceptions of the State of New York, in which the National Trust and the Municipal Art Society elected not to join.

Master acknowledged, plainly relevant to a case, such as the present one, involving the future of a recognized national treasure. (R. 163-67.) The parties are unlikely to address this issue in their Briefs, but Amici are ready and willing to furnish the Court with an independent and informed assessment of how the outcome recommended by the Report would affect the preservation future of Ellis Island.

WHEREFORE, Amici respectfully move this Court that leave be granted to file the annexed brief as *amici curiae*.

Dated: New York, New York

July 30, 1997

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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**BRIEF OF *AMICI CURIAE* NATIONAL TRUST FOR
HISTORIC PRESERVATION AND MUNICIPAL ART
SOCIETY IN SUPPORT OF THE EXCEPTIONS
OF THE STATE OF NEW YORK**

The National Trust for Historic Preservation in the United States and the Municipal Art Society of New York (the "Preservation Amici")¹ submit this brief, as *amici curiae*, in support of the exceptions of the State of New York to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R.").

¹ Pursuant to Rule 37.6 of this Court, the Preservation Amici state that this Brief was not authored in whole or in part by counsel for a party, and no person or entity other than the Amici and their counsel made a monetary contribution to the preparation of this Brief.

INTEREST OF *AMICI CURIAE*

Amici are national and local organizations dedicated to historic preservation. This action concerns whether the State of New York or the State of New Jersey has "sovereign" jurisdiction over Ellis Island. The dispute turns on the interpretation of the terms of a compact entered into between New York and New Jersey in 1834 concerning their Hudson River/New York Harbor boundary (the "Compact"), and the course of conduct of the two States and the Federal Government with regard to this boundary in the ensuing century and a half. More important, however, this action, and the result recommended by the Special Master in the Report, raise issues as to whether the historic integrity of Ellis Island can be effectively protected if sovereignty over the Island, which is currently exercised solely by the Federal Government through the National Park Service, is divided between New York and New Jersey.

Amici possess a unique store of knowledge about historic preservation generally and Ellis Island in particular, and can offer a distinct perspective on the issues raised in this case. As organizations dedicated to the preservation of national and local landmarks, Amici also have a significant interest in the outcome of this litigation. Few landmarks have touched the lives of more Americans than Ellis Island.

SUMMARY OF ARGUMENT

The original jurisdiction bestowed on this Court by Article III, § 2 of the Constitution was intended to be used to *resolve* rather than *create* boundary disputes between States. Yet the Report filed by the Special Master in this case asks this Court to endorse an outcome that, under circumstances where the Federal Government relinquished legal title and control over Ellis Island, would engender more disputes than it would settle. The Report recommends that sovereignty

over Ellis Island be split between New York and New Jersey, but it makes no meaningful attempt to take into account or obviate in any way the adverse consequences that the "split sovereignty" remedy it proposes will have on Ellis Island as a National Historic Landmark.

The National Park Service, as the Report recognizes (R. 8-9), currently holds legal title to and exercises exclusive jurisdiction over Ellis Island. So long as that remains the case, the Island's historic sites and buildings will remain subject to a single and responsible preservation program, as required by federal law. Federal law will govern preservation of these sites and buildings and federal officials will ensure that these laws are effectively implemented. If, however—in the scenario envisioned by the Special Master—the Federal Government were to relinquish control of all or part of the Island, and the Report's "split sovereignty" remedy were adopted, the integrity of Ellis Island's historic character could be in jeopardy. Under the Solomon-like resolution proposed by the Special Master, the Island—which will undeniably experience further private development pressure in the near term—would be split between the two States along a jagged and irregular border likely to spark serious practical and legal conflicts.

The Special Master pays lip service to these concerns by "equitably reconstituting" the "original island" so as not to split the Main Building into several pieces, but this half-measure falls far short of a satisfactory solution. Ellis Island forms an integral ensemble of historic buildings, and it should be treated as such, subject to a single set of preservation laws and comprehensive preservation planning and administration. Any other solution, including the Special Master's "reconstitution," would, in the event of federal relinquishment of control, raise issues of administrative impracticality and the impossibility of applying two sets of laws and regulations to different components of the same

structural compound. It would also ignore the symbolic significance of the Island. This Court cannot turn the clock back to 1834, when only a small fort stood on a much smaller Island. It must look at Ellis Island, as it exists today, after a federal presence of more than a century, and in the context of the "immigrant" experience that transformed a federal installation into an icon of American history and culture and a unit of the National Park System. It must recognize that it is Ellis Island as a whole, and not just its individual buildings, that is etched into the memories of millions of Americans as the Gateway to America.

Nothing in the record suggests that splitting sovereignty over Ellis Island would have anything but deleterious effects on the Island's historic resources. This is so for at least two reasons. *First*, as a matter of administration, dividing the Island would create, as the Second Circuit has already found, an impractical, indeed nonsensical, situation. *Collins v. Promark Prods., Inc.*, 956 F.2d 383, 388 (2d Cir. 1992). As the May 14, 1997 "remedy" hearing on Ellis Island demonstrated, the solution recommended by the Report would cause portions of the Island's historic core (the complex of structures including the Main Building, the Kitchen & Laundry Building, the Baggage & Dormitory Building, several connecting structures and stairways, and unexcavated portions of Fort Gibson) to straddle the proposed boundary between the two States, compelling both States to share a responsibility for the complex's preservation, which history suggests could not be allocated amicably or effectively. *Second*, even assuming that an allocation could be agreed to, those responsible for managing and maintaining the Island's buildings would be saddled with the burden of answering to two historic preservation commissions with disparate resources and inconsistent landmarks laws. New York's landmarks laws are well-established and consistently enforced; the corresponding

New Jersey laws, on both the local and state levels, are neither as proven nor as extensively developed. In the absence of federal control, conflicts between the two States' laws and policies would be certain to arise in connection with reuse and further restoration of the Island, and these conflicts would likely lead the States to seek further relief in this Court. The landmark structures and overall historic integrity of Ellis Island would be the victims of such protracted and contentious disputes.

Thus, in addition to all the other reasons for rejecting the Report proffered by the State of New York and the other amici, the Court should reject the Report because the remedy recommended by the Special Master is impractical and unworkable. In the alternative, to the extent that "equity" can be properly invoked in this case, it should be invoked to protect Ellis Island's historic past by keeping it subject to a single sovereign. If that sovereign does not continue to be the Federal Government, it should be the State of New York.

POINT I

SPLITTING SOVEREIGNTY OVER ELLIS ISLAND WOULD BE IMPRACTICAL AND WOULD, IN THE EVENT OF FEDERAL RELINQUISHMENT OF JURISDICTION, IMPROPERLY ENGAGE THIS COURT IN A ROLE OF "CONTINUING SUPERVISION" OVER THE ISLAND

Adopting the remedy recommended by the Report would, in the event that the Federal Government relinquished control of Ellis Island, violate one of this Court's cardinal tenets in exercising its original jurisdiction over disputes between the States. In such cases, any need for "continuing Court supervision over decrees" has long been deemed "undesirable." *Vermont v. New York*, 417 U.S. 270, 277 (1974). Engaging in such an oversight role,

[W]ould materially change the function of the Court in these interstate contests. Insofar as [the Court] would be supervising the execution of the consent decree, [it] would be acting more in an arbitral rather than a judicial manner. [The Court's] original jurisdiction heretofore has been deemed to extend to adjudication of controversies between States according to principles of law, some drawn from the international field, some expressing a "common law" formulated over the decades by this Court.

Id. at 277.

The record in this case conclusively demonstrates that, if the Report's recommendations were adopted, and the Federal Government relinquished control over Ellis Island, such "continuing supervision" by the Court would be difficult to avoid. Hence, this Court should reject the Report's recommendation to split Ellis Island along a jagged and irregular boundary, just as it has rejected similarly unmanageable remedies in the past. See *Texas v. New Mexico*, 462 U.S. 554, 566 (1983) (continuing supervision of decrees would test the limits of proper judicial functions); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) (continuing Court supervision over decrees between States was undesirable); *Wyoming v. Colorado*, 298 U.S. 573, 585-86 (1936) (refusing to order water measuring devices or to appoint "water master" to keep records); *Wisconsin v. Illinois*, 289 U.S. 395, 412 (1933) (denying request to appoint commissioner to execute decree between States).

There can be little doubt that adopting the "strange and difficult" boundary proposed by the Report would entangle the Court in mediating numerous collateral disputes between New York and New Jersey. *Collins v. Promark Prods., Inc.*, 956 F.2d 383, 388 (2d Cir. 1992). Indeed, in *Collins*, which concerned a suit by a private plaintiff against, *inter alia*, the

Federal Government—rather than a suit between two States—the Second Circuit rejected as inherently controversial and ultimately unworkable the very solution that the Report currently proposes. The Second Circuit feared that the "haphazard and uneven" boundary, proposed there by the Federal Government in seeking dismissal of a tort action on Ellis Island, would "make it necessary for every person injured on Ellis Island to engage in litigation to establish the exact spot on the island where the injury was sustained." *Id.* at 388. The dilemma would be even more acute in a preservation context: tort victims happen along relatively infrequently; but the maintenance and development of landmark sites invariably entails frequent decisions about proper design, rehabilitation, demolition, and use. Such decisions would likely involve state and local government scrutiny, necessarily transforming any disagreements into disputes between sovereigns.

The Court's reluctance to engage in "continuing supervision" in boundary cases is a specific application of the principle that courts should undertake to grant only such relief as can be effectively administered without undue cause for additional disagreement or need for judicial oversight. See *Nebraska v. Iowa*, 406 U.S. 117, 119 (1972) (courts should not grant relief that is likely to "prove[] impossible to apply in all cases").² More broadly speaking, the solution put

² See also *King County v. Washington State Boundary Review Bd.*, 860 P.2d 1024, 1040 (Wash. 1993) (courts should not uphold administratively-determined boundaries that are "abnormally irregular" and thus administratively "impractical"); *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975); *Yonan v. Oak Park Fed. Sav. & Loan Ass'n*, 326 N.E.2d 773 (Ill. App. 1975); *United Coin Meter*

forward by the Report is similar to what this Court has elsewhere (in the context of Indian reservation territorial disputes) condemned as "checkerboard" jurisdiction. See *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). In *Moe*, *Seymour*, and their progeny, the fear concerning such "checkerboard" jurisdiction was that "law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, was in the State or Federal government." *Seymour*, 368 U.S. at 358; see *Moe*, 425 U.S. at 478 (applying same principle in civil taxation context).³

On Ellis Island, absent the presence of the Federal Government, those responsible for and affected by the Island's preservation (e.g., preservation commissioners, staff, and private applicants) would need to overlay and scrutinize jurisdictional and historical maps of Ellis Island, as well as individual building floor plans, in order to ascertain which State's preservation law should govern maintenance, construction, reconstruction, alterations, and demolition on the Island. The Report's description of the proposed boundary and the difficulties already encountered by both States in undertaking to map it out across and around the Island's historic structures is a harbinger of problems to

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Co. v. Johnson-Campbell Lumber Co., 493 S.W.2d 882 (Tex. App. 1973).

³ See also *DeCoteau v. District County Court*, 420 U.S. 425, 466 (1975) (Douglas, J., dissenting) (discussing problems with "crazy quilt" or "checkerboard jurisdiction"); *Cardinal v. United States*, 954 F.2d 359 (6th Cir. 1992).

come. (Supplement to Final Report dated May 30, 1997; Transcript of Hearing on May 14, 1997). Should the Report's recommendations be adopted, such trial and error speculation could become a frequent occurrence, thereby providing numerous occasions for further disputes between New York and New Jersey—which (as controversies between States) would likewise fall within the original jurisdiction of this Court. See *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (Supreme Court jurisdiction over dispute between States concerning impact of one State's statute on other State's citizens); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (same); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (same). That is exactly the result this Court has sought to avoid in the past. *Vermont*, 417 U.S. at 277; *Texas*, 462 U.S. at 566. It should do no less in this case.⁴

⁴ On the rare occasion when the Court has consented to anything resembling an "ongoing supervision" role, it has done so through functionaries with purely ministerial powers. See, e.g., *New Jersey v. New York*, 347 U.S. 995, 1002-03 (1954) (river master appointed to measure diversions, compile data, and apply computational formulae); *Texas v. New Mexico (II)*, 482 U.S. 124, 134 (1987) (river master appointed whose sole purpose was to "make the calculations provided for in this decree, annually and as promptly as possible as data are available, and to report the calculations to appropriate representatives of New Mexico and of Texas"). By contrast, the Court or a Court-appointed administrator in this case would have to do more than simply make calculations and compile data. The Court or an administrator would have to determine the applicable law in each specific dispute and to determine the rights of the parties involved. Thus, the result recommended by the Report would place the Court in the position of acting as an arbitrator—a position which the Court has said has "no relation to [the]

The prior history of relations between New York and New Jersey strongly suggests that further resort to this Court would be likely. History shows that, even where cooperative arrangements have been put into place, productive alliances have been difficult. For example, the disputes between New York and New Jersey over the affairs of the Port Authority of New York and New Jersey (a bi-state agency created by compact in 1921 to develop and manage joint transportation facilities) have been long-standing and well-publicized. See *City of New York v. Willcox*, 189 N.Y.S. 724 (Sup. Ct. 1921); *Mayor Seeks \$400 Million For Airports*, N.Y. TIMES, Jan. 16, 1996 (Appendix, Tab I)⁵; *Giuliani Seeks Arbitration With N.Y.-N.J. Port Agency*, BOND BUYER, Dec. 12, 1995 (Appendix, Tab J); *\$7 Toll To Cross Hudson River? Report Sparks Border Feud*, THE RECORD (Northern New Jersey), Aug. 24, 1995 (Appendix, Tab K); *Board Backs Pataki Appointment To Port Authority on Split Vote*, A.P., Feb. 9, 1995 (Appendix, Tab L); see generally Note, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416, 1419 (1966). The very fact that a suit was filed in this matter, for what appear to be symbolic rather than practical motivations, leaves little room for doubt that a return to the courtroom could occur.

Conflicts between the two local preservation programs concerning Ellis Island are likely to occur even if the Federal

(...continued)

performance of [its] Article III functions." *Vermont*, 417 U.S. at 277.

⁵ Citations to "Appendix, Tab ____" refer to the Appendix filed by the Preservation Amici in connection with their Post-Trial Brief filed with the Special Master on October 3, 1996 (Docket No. 368).

Government does not relinquish its control of the Island in the near future. The New York City or Jersey City landmark laws could apply to any private developer who enters into a long-term lease (depending on its terms) with the Federal Government for development of any portion of the Island. See *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 565 (1946) (private entity developing federal property held under an executory contract of sale subject to state taxation); *Offutt Hous. Co. v. County of Sarpy*, 351 U.S. 253, 260 (1956) (value of housing project built by private developer on land leased from Federal Government subject to state taxation); cf. *United States v. Johnson*, 994 F.2d 980, 986 (2d Cir.) (Federal Government can continue to exercise jurisdiction over ceded land only so long as used for purposes ceded), *cert. denied*, 510 U.S. 959 (1993). Past development efforts—and the dearth of federal resources—suggest that such private development is an unfortunate but plausible scenario for the Island's future. In the event that the Federal Government were to relinquish control of the Island, the conflict would devolve into a two-way contest concerning whose law and administrative process should control further development decisions.⁶

⁶ Even if private development was deferred or precluded, consistent, comprehensive planning could be difficult, if not impossible. As a matter of comity, the Federal Government currently consults with *both* New York and New Jersey concerning matters affecting Ellis Island *as a whole*, even when it is not required to do so by federal statute or regulation. See, e.g., *Ellis Island Rehabilitation Project-Phase II*, NPS Document (Dec. 17, 1991) (Appendix, Tab M); cf. National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470a(b)(3)(1995); 36 C.F.R. §§ 800.1(c)(1)(ii), (c)(2)(i) (requiring federal officials to review and consult with "State Historic Preservation Officer" and local

Either way, the historic buildings of Ellis Island and the United States citizens who cherish them would be the victims of the Report's current effort to rewrite history. The process of constantly re-ascertaining sovereignty, which would be required by the proposed boundary, would be "uncertain and hectic," likely to benefit "only those who benefit from confusion and uncertainty," and equally likely to hamper legitimate efforts at ensuring Ellis Island's historic integrity for future generations. See *Decoteau*, 420 U.S. at 466. The tortured border that the Report urges the Court to accept would make it inordinately difficult to determine under whose authority or preservation laws such decisions should be made, could subject different parts of a single historic district to different standards, and could generate duplicative administrative procedures. A return to this Court would be all but unavoidable, a result which in and of itself is enough to justify rejecting the impractical remedy recommended by the Report.

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governments regarding impact of federal undertakings on historic properties). If the Report's recommendations were adopted, federal authorities could become entangled in disputes between the States over which State's law should guide the National Park Service in its administration of matters within each State's difficult-to-discern boundaries on the Island.

POINT II

IN THE ABSENCE OF FEDERAL CONTROL, EFFORTS AT JOINT ALLOCATION OF PRESERVATION RESPONSIBILITY WOULD BE FRUSTRATED BY DISPARITIES BETWEEN NEW YORK'S AND NEW JERSEY'S HISTORIC PRESERVATION PROGRAMS

Even if the practical difficulties inherent in the Report's proposed remedy could be overcome, efforts at joint administration would, in the absence of federal control of Ellis Island, ultimately be frustrated by the disparate resources of New York's and New Jersey's historic preservation programs and substantive differences in their respective state and local landmarks laws and regulations.

A. **DISPARITIES BETWEEN THE NEW YORK CITY AND JERSEY CITY LANDMARKS PROGRAMS WOULD HINDER FUTURE PRESERVATION EFFORTS ON THE ISLAND**

The disparity between the expertise and overall approach to preservation that New York City and Jersey City would bring to Ellis Island, and the resources each could dedicate to the Island, would hinder future preservation efforts on the Island. New York City's landmarks law was adopted in 1965, and it has since been acknowledged as one of the most comprehensive in the nation. *See* N.Y.C. Charter § 3020 and New York City Landmarks Preservation and Historic Districts Law, N.Y.C. Admin. Code § 25-301 *et seq.* (collectively, the "New York Landmarks Law" or "NYLL") (Appendix, Tab N); *see generally Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). As of 1995, nearly 1,000 individual landmarks had been designated, together with 95 significant interiors, 68 historic districts (including

Ellis Island), and 9 scenic landmarks, for a total of more than 20,000 properties. See *New York City Landmarks Preservation Commission Fact Sheet* (1995) ("LPC Fact Sheet") (Appendix, Tab F). Moreover, a substantial body of case law has arisen construing the New York Landmarks Law. See, e.g., *Penn Central*, 438 U.S. at 104; *Rector, Wardens & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991); *Teachers Ins. & Annuity Ass'n v. City of New York*, 623 N.E.2d 526 (N.Y. 1993); 383 *Madison Assocs. v. City of New York*, 598 N.Y.S.2d 180 (App. Div.), appeal dismissed, 622 N.E.2d 307 (N.Y. 1993), review denied, 632 N.E.2d 461 (N.Y.), cert. denied, 511 U.S. 1081 (1994); *Shubert Org., Inc. v. Landmarks Preservation Comm'n*, 570 N.Y.S.2d 504 (App. Div.), review denied, 587 N.E.2d 289 (N.Y. 1991), cert. denied, 504 U.S. 946 (1992); *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183 (N.Y.), cert. denied, 479 U.S. 985 (1986); *Lutheran Church In America v. City of New York*, 316 N.E.2d 305 (N.Y. 1974).

The City's preservation agenda has been overseen by the Landmarks Preservation Commission, an independent New York City agency, which is headed by a full-time Chairperson and includes ten additional commissioners, the majority of whom must have expert credentials, including as professional architects, landscape architects, historians, urban planners or realtors. See N.Y.C. Charter § 3020. The Commission's work is carried out by a staff of 48, with a budget for fiscal year 1995-96 of \$2.7 million. Most of the Commission's non-clerical staff have graduate degrees in architecture, architectural history, historic preservation, urban planning or law. See LPC Fact Sheet (Appendix, Tab F). Moreover, the Commission has often been aided in its efforts by an active and substantial community of urban planning and historic preservation groups, including the Municipal Art Society, the New York Landmarks Conservancy, the Historic

Districts Council, the Preservation League of New York State, and the National Trust for Historic Preservation, which have statewide as well as national reputations for leadership in historic preservation.

By contrast, Jersey City has had a comprehensive landmarks law on its books only since 1989. *See* Jersey City Historic Preservation Law, Jersey City Code §§ 345-79 *et seq.* (the "Jersey City Landmarks Law" or "JCLL") (Appendix, Tab G). Its preservation and coordination activities are carried out by a single employee in the City planning department—the City Historic Preservation Officer. JCLL § 345-87. As of 1995, only 3 individual landmarks and 4 historic districts had been designated. No reported court decision has construed the terms or effect of the Jersey City Landmarks Law. There have in the past been numerous vacancies on the Jersey City Historic Preservation Commission, an entity which, apart from the Commissioners themselves, does not appear to have a clear-cut existence separate from the Jersey City Planning Commission. *See* JCLL § 345-87; *see also* Al Frank, *Jersey Challenge Fails As N.Y. Panel Moves Ellis Island Landmark Status*, NEWARK STAR-LEDGER, Feb. 8, 1994 (Appendix, Tab H). The Commission has nine regular members with a "demonstrated interest, competence or knowledge in historic preservation." JCLL § 345-82. However, only four Commissioners are required to have either "knowledge in building design and construction or architectural history" or "knowledge or a demonstrated interest in local history." *Id.* This relative lack of expertise compared to New York is exacerbated by the fact

that the Commission has only one staff person and a budget for fiscal year 1995-96 of only \$2,000.⁷

The disparity between the resources and experience available to the New York City Landmarks Commission and the Jersey City Historic Preservation Commission could have serious consequences on Ellis Island. Structures straddling the proposed boundary could find themselves the subject of intense scrutiny on the New York side of line, while their

⁷ Furthermore, the two Commissions have different relationships, in terms of power and independence, with respect to local government. For, example, the Jersey City law grants great discretion to the Jersey City City Council: applications for landmark designation are submitted first, not to preservation professionals, but to the City Council, which *may* (but need not) submit them to the Commission. *See* JCLL § 345-93(a). In New York City, by contrast, the Commission designates landmarks and historic districts (which designations become immediately effective), and thereafter the City Council has an opportunity to either disapprove or modify the Commission's designations. *See* NYLL § 25-303. The New York City Commission has made over 1,100 designations (involving more than 20,000 buildings) since 1965, less than 25 of which have been modified or disapproved.

Property owners also have amplified influence under the Jersey City law to exempt their property from designation. If the owner of a building selected for designation or 20% of the residents in or within 200 feet of a proposed historic district object to designation, designation requires a 2/3 vote of the City Council. *See* JCLL § 345-93(d). In New York, on the other hand, an objection by property owners or neighbors will not impede the designation process. This provision of the New York City law has been reviewed with approval by New York's highest court. *See Teachers*, 623 N.E.2d at 526.

New Jersey counterparts languish unattended and imperiled. Further, the still-ruined structures on the Island's southern half, which remains undeveloped and would fall entirely on New Jersey's side of the boundary, could be demolished or inappropriately rehabilitated with minimal protest from New Jersey—primarily because the Jersey City Historic Preservation Commission may lack the experience, the authority, or the resources to dictate otherwise.

B. THE DISPARITIES BETWEEN THE TWO CITIES' HISTORIC PRESERVATION PROGRAMS WOULD BE COMPOUNDED BY SUBSTANTIVE DIFFERENCES IN THEIR RESPECTIVE LANDMARKS LAWS

The problems caused by the disparities in scope of New York City's and Jersey City's historic preservation programs would be compounded by substantive differences in their respective landmarks laws and regulations. Significant differences between the two laws fall into three categories—(1) scope, (2) procedures, and (3) standards. Perhaps the most dramatic and important difference is in the scope of the laws. In stark contrast to New York City's law, for example, the Jersey City Landmarks Law exempts landmarks owned by not-for-profit entities. JCLL § 345-93(n). Thus, if any of Ellis Island's historic buildings were eventually transferred to a not-for-profit entity—such as the already-active Statue of Liberty/Ellis Island Foundation or another cultural institution—such an owner would be completely exempt from review by the Jersey City Landmarks Commission, no matter how destructive the proposed development might be.⁸

⁸ New Jersey's contrary contentions notwithstanding, *see* Letter Brief of the State of New Jersey dated Apr. 1, 1996 ("Letter Brief") (Appendix, Tab O), the applicability of related New

Nor does Jersey City's law expressly provide for the landmarking of significant public interiors, whereas New York City's interior landmarking provision has been validated by New York's highest court. NYLL § 25-302[m]; JCLL § 345-93; *see Teachers*, 623 N.E.2d 526 (Four Seasons Restaurant interior designation upheld); *Shubert*, 570 N.Y.S.2d 504 (interior designation of Broadway theaters upheld). New York City has already acted to recognize the Registry Room in the Main Building on Ellis Island through interior landmark designation. *See* Letter dated Nov. 24, 1993 from Landmarks Preservation Commission (Appendix, Tab P). Absent federal control, if, as the Report recommends, New Jersey law were to apply to the structures adjoining the Main Building, such as the Kitchen & Laundry Building and the Baggage & Dormitory Building—and especially to the connecting structures between those buildings and the Main Building—conflicts would be certain to arise.

Less dramatic but no less important to the historic integrity of Ellis Island are procedural differences between the two landmarks laws. For example, applications for certificates of appropriateness, which are required to "construct, reconstruct, alter or demolish any improvement on a landmark site," must be the subject of a public hearing

(...continued)

Jersey state laws to not-for-profits would not impose any additional restrictions relating to historic landmarks on such organizations. No matter whether relevant development efforts were commercial or not-for-profit, the inherent limitations of these state laws would not afford any protections beyond those provided by the Jersey City Landmarks Law—which simply does not apply to landmarks owned by not-for-profit entities.

in New York, NYLL § 25-307-08, but not in Jersey City. See JCLL § 345-89(b)(3) (application for certificate of appropriateness "deemed approved"—with no need for hearing—if Historic Preservation Commission fails to act within 35 days).⁹ The public hearing is uniquely useful for presenting a proposal in "full view" to the community and for ascertaining the community's concerns about historic preservation. Such hearings typically help local officials identify and resolve troublesome aspects of a proposal, and

⁹ While New Jersey has argued otherwise, see Letter Brief at 17-18, New Jersey's Open Public Meetings Act (the "OPMA") only applies when a government body actually holds a meeting. See N.J. Stat. Ann. 10:4-6; see also *Downtown Residents for Sane Dev. v. City of Hoboken*, 576 A.2d 926, 931 (N.J. Super. Ct. App. Div. 1990) (no violation of OPMA because "no showing that a meeting occurred"). Where approval can be granted by inaction, as it can be in Jersey City, no meeting is required, and the OPMA does not apply. Cf. *Application of North Jersey Dist. Water Supply Comm'n*, 417 A.2d 1095 (N.J. Super. Ct. App. Div.) (denial of hearing by Commissioner of Environmental Protection under state historic preservation law upheld because, *inter alia*, applications deemed approved if Commissioner fails to act within 120 days), *cert. denied*, 427 A.2d 559 (N.J. 1980). Moreover, even if the OPMA were applicable, it would require only that the public be permitted to *attend* Commission meetings, not to *participate* in the decisionmaking process with the procedural safeguards provided by the New York Landmarks Law. Compare N.J. Stat. Ann. § 10:4-12 (public body may "prohibit or regulate the active participation of the public at any meeting") with NYLL § 25-313 (New York City Commission must "afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard").

give applicants ideas about how to make their proposals more appropriate.

Finally, the standards employed under each law differ. Most significantly, the New York City and Jersey City landmarks laws have very different criteria for determining whether alterations to historic structures are appropriate. Under the New York City Landmarks Law, the specific criteria to be applied in reviewing proposed changes to designated buildings are set forth explicitly. *See, e.g.*, NYLL § 25-307[b]; *see also* NYLL §§ 25-306, 307, 310, and New York City Rules & Regulations, Tit. 63. Overall, application of the law is predictable and consistent. By contrast, both the standards to be applied under the Jersey City Landmarks Law and the relationship among its provisions are often unclear and susceptible to potential abuse. The standard for issuance of a "certificate of no effect" ("CNE") demonstrates this ambiguity. The Jersey City Landmarks Law provides that issuance of a CNE requires a determination that the work proposed is "not detrimental." JCLL § 345-80. However, the procedures for issuance of a CNE list a confusing array of (in some places contradictory) factors for consideration by the Jersey City Historic Preservation Commission in making such determinations. *Compare* JCLL § 345-89 (procedures for obtaining a certificate of appropriateness or certificate of no effect) *with* JCLL § 345-94 (Standards for the Commission's Decisions). Compounding the difficulties of applying these multiple standards simultaneously is the lack of guidance as to precisely when the various standards apply. Similar problems exist for certificates of appropriateness, which are issued when major alterations are proposed. *Id.* In some sections of the law, the appropriate standard for the

project is not even specified. See, e.g., JCLL § 345-92[c] (criteria for "non-commercial" hardship applications).¹⁰

The application of such inconsistent landmarks laws could prove particularly problematic on Ellis Island. If the Report's recommendations were adopted, and in the event of federal abandonment, preservation and rehabilitation of some of the Island's most important historic structures would trigger conflicting procedural and substantive standards.

¹⁰ Despite New Jersey's contrary contentions, New Jersey state law would not furnish Ellis Island with any additional preservation safeguards. See Letter Brief at 15-16. Neither New Jersey's Historic Sites Law, N.J. Stat. Ann. § 13:1B-15.128 *et seq.*, nor its Waterfront Development Law, N.J. Stat. Ann. § 12:5-1 *et seq.*, would afford Ellis Island any greater measure of protection for preservation purposes. To the contrary, New Jersey's Historic Sites Law protects against only state and local governmental action, and does not apply to private development. See *Hoboken Env't Comm., Inc. v. German Seaman's Mission*, 391 A.2d 577 (N.J. Super. Ct. Ch. Div. 1978) (N.J. Historic Sites Law only protects against governmental and not private encroachment); *Application of North Jersey Dist. Water Supply Comm'n*, 417 A.2d 1095 (N.J. Super. Ct. App. Div.) (Historic Sites Law provides for only limited enforcement by the public and permits the Commissioner of Environmental Protection to authorize "encroachment" by pure inaction), *cert. denied*, 427 A.2d 559 (N.J. 1980). New Jersey's Water Development Law actually encourages commercial development, *Last Chance Dev. Partnership v. Kean*, 575 A.2d 427, 433 (N.J. 1990) (limiting Water Development Law to protection of "commercial" interests), but in any event, may well be preempted by Jersey City's Landmarks Law. *Anfuso v. Seeley*, 579 A.2d 817 (N.J. Super. Ct. App. Div. 1990) (Water Development Law preempted by local land use regulation).

Thus, for example, New Jersey officials might deem efforts to restore a facade on any of the connecting structures that straddle the proposed New York/New Jersey boundary (such as between the Main Building and the Baggage & Dormitory Building) as "not detrimental" to the New Jersey section of the facade, and endorse the work, while New York officials might object to the work after concluding that it would "affect" an architectural feature of the facade on the New York side of the boundary. Similarly, such a proposal could be construed as work requiring a public hearing in New York, but no public hearing in New Jersey. Such conflicts could, at the very least, cause bureaucratic paralysis, while officials decided how to avoid violating either City's law. At worst, disputes arising from these conflicts could compromise Ellis Island's historic integrity through delayed repairs and inconsistent preservation or alteration efforts. All of these differences make it inevitable that, in the absence of federal control of Ellis Island, even good faith efforts to harmonize New York's and New Jersey's preservation programs would be fraught with problems and unlikely to succeed.

POINT III

TO THE EXTENT THAT EQUITY MAY BE INVOKED IN AN ORIGINAL CASE, IT SHOULD BE INVOKED HERE TO KEEP ELLIS ISLAND SUBJECT TO A SINGLE SOVEREIGN

The facts and the law before the Court lead inescapably to the conclusion that dividing Ellis Island—as New Jersey had proposed and on the assumption that the Federal Government might relinquish control over the Island—would give rise to conflicts between the two States' preservation programs that would improperly engage this Court in a role of "continuing supervision" with respect to the Island's landmarks. In a perfunctory effort to ameliorate this

objectionable outcome, the Special Master recommends "equitably reconstituting" the so-called "original island," so as not to split the Main Building into several pieces. While agreeing with this result as to the Main Building, the Preservation Amici note that "equity" should have no place in a case that can be decided on the basis of compact construction and the additional arguments advanced by New York and the other amici. *See Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983) ("If there is a compact, it is a law of the United States, and our first and last order of business is interpreting the compact."); *accord Arizona v. California*, 373 U.S. 546, 565-66 (1963). However, to the extent this Court determines that equitable and historical factors should be applied to decide this compact case, the Amici respectfully submit that those factors should be invoked more readily in favor of a remedy that protects the Island's historic integrity as opposed to a remedy that appears to serve chiefly New Jersey's development interests. *See For Ellis Island, New Talk of a Hotel, a Bridge and Masses Yearning to Get In Free*, NEW YORK TIMES, Apr. 3, 1997 (New Jersey officials opining that the Report's recommendations would rekindle commercial development plans for Ellis Island).

If anything, the Report construes too narrowly the remedies that equity would make available if it were properly invoked in this case. After acknowledging the impracticality and likely detriment of a "split sovereignty" remedy, the Report goes on to recommend granting to New York a fraction of an acre above and beyond the acreage included in the least generous estimate of the area of the "original" Ellis Island.¹¹ In the process, it draws a boundary that, without

¹¹ The arbitrary nature of the Report's point of departure for invoking equity is well-illustrated by its choice of the 1857 map as the best estimation of the size of the "original" Ellis

explanation, would cut through the heart of the ensemble of buildings forming the Island's historic core (including the Main Building, the Baggage & Dormitory Building, the Kitchen & Laundry Building and several connecting structures). Most tellingly, it would cut in half an as-yet-unrestored exterior staircase connecting the Main Building and the Baggage & Dormitory Building, thereby highlighting once again the Preservation Amici's chief concerns. Which State's law (if the Federal Government were to relinquish control of the Island) is to govern preservation, restoration and/or demolition of this structure? Will New York seek to restore it and New Jersey vote in favor of demolition? Who but this Court would have the power to resolve this impasse? The Preservation Amici urge this Court to avoid such a dilemma by invoking equitable principles to apportion to New York as much jurisdiction over Ellis Island as is necessary to safeguard the Island's future as a monument with more personal connections to more individual Americans than any other in the nation.

(...continued)

Island. The Report concedes that this choice is "potentially flawed," but ignores the contradictory premises upon which this choice is based. (R. 156 n.62.) The Special Master chose this map—created over twenty years after the Compact was executed—notwithstanding the availability of what the Report terms "probative and convincing" testimony from New York's experts as to the size of the Island in 1836 and maps (containing more detailed tidal data) created in 1836 and 1841. (R. 160 n.63.) This choice cost New York as much as an additional acre in territory, which, the Preservation Amici submit, would have been enough to provide an equally plausible baseline for invoking equity to shelter the Island's historic core.

Equity has certainly been utilized to this extent and with this effect in the cases cited by the Special Master to support his recommended "reconstitution" of Ellis Island. Indeed, in each of those cases, the difference between what was required by the letter of the law and what was deemed warranted by equitable considerations was far more substantial than the fraction of an acre the Report offers to grant to New York. Thus, in *Vermont v. New Hampshire*, 289 U.S. 593, 595 (1933), for example, the Court's employment of equitable principles resulted in the addition to New Hampshire of a strip of land between high and low water that ran for many miles along the Connecticut River. Similarly, the adoption of the "thalweg" instead of the geographical center approach in *New Jersey v. Delaware*, 291 U.S. 361 (1934), resulted in the effective cession to Delaware of many square miles of territorial waters. See also *New Mexico v. Colorado*, 267 U.S. 30, 37 (1925) (invoking equity to establish Colorado claim to "large strip of territory" including "the greater portions of one town and two villages, and five post offices"); *Maryland v. West Virginia*, 217 U.S. 1, 46 (1910) (invoking equity to establish Maryland claim to a strip of territory entailing approximately 50 square miles).

This Court could use equitable principles to fashion any number of remedies that would much better serve Ellis Island's future than that proposed in the Report. It could do so on a territorial basis by looking to any of the several alternative allocation schemes proffered by New York but summarily rejected by the Special Master at the May 14, 1997 hearing. See Supplement to Final Report at 15-16. Any of those proposals would shield from the "split sovereignty" quandary a greater proportion of the Island's historic structures than the boundary recommended by the Report. Alternatively, the Court could, consistent with the principles of the cases relied upon by the Report, use equity to leave all of Ellis Island subject to New York's law for all

purposes, including historic preservation regulation. The Court could look to New Jersey's 1904 "sale" of its property interest in the underwater land surrounding Ellis Island as a renunciation of any responsible role with respect to the Island, note New York's ongoing interest in the Island's affairs, and conclude that equity requires that New York retain sovereignty over the Island in the event of federal abandonment of the Island.¹²

The Report ignores entirely the fact that Ellis Island has long been subject to the control of a single sovereign. The Federal Government—not New Jersey and not New York—created the landfill that forms the *res* of this action, built the Immigration Station, and conducted the activities there that have given Ellis Island its significance in modern American history and culture. Keeping Ellis Island subject to the preservation laws of a single sovereign is the best way to ensure that Ellis Island survives in a form consonant with the images of its past that are etched in the memories of millions of Americans. The Court can reach this result as a matter of law or as a matter of equity, but, in either event, if that

¹² As a further alternative, the Court could use equity to reach a conclusion which the New York Landmarks Amici argue elsewhere is required by the terms of the Compact—that, at the very least, Article III left New York with "police power" jurisdiction, and thus historic preservation control, over Ellis Island. See Brief of New York Landmarks Amici, Point II. Thus, even if the Court were unwilling to extend the boundaries of New York's territory on the Island beyond those proposed by the Report, such a remedy would ensure that New York's demonstrably more protective Landmarks Law would govern development plans on Ellis Island in the event of federal relinquishment of control over the Island.

sovereign does not continue to be the Federal Government, it should be the State of New York.

CONCLUSION

For all the foregoing reasons, the Court should reject the Report of the Special Master because the remedy recommended by the Report is impractical and unworkable. In the alternative, to the extent that "equity" is properly invoked in this case, it should be invoked to protect Ellis Island's historic past by keeping it subject to a single sovereign. If that sovereign does not continue to be the Federal Government, it should be the State of New York.

Dated: New York, New York

July 30, 1997

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October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

BRIEF FOR THE CITY OF NEW YORK, AS AMICUS CURIAE, IN SUPPORT OF THE STATE OF NEW YORK'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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No. 120, Original

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

BRIEF FOR THE CITY OF NEW YORK, AS AMICUS CURIAE, IN SUPPORT OF THE STATE OF NEW YORK'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

INTEREST OF AMICUS CURIAE

As authorized by Rule 37.4, the City of New York (the "City") submits this brief in support of the defendant State of New York, urging that the Special Master's resolution of this case in favor of the State of New Jersey be rejected by this Court as contrary to law and without support in the record.

New York City's compelling interest in this litigation was recognized by the Special Master. Although denying the City's motion seeking formal intervenor status, he nevertheless invited it to participate as an "active amicus." See, Docket Item No. 70. The concerns prompting the City to participate in the defense of this case, to the extent permitted, are rooted in the historical record, which clearly reveals that, until the Special Master undertook to recommend its division, Ellis Island, as an entity, was always considered within the physical boundaries and under the local governmental jurisdiction of the City of New York.

The Special Master's decision effectively reverses a situation dating back to the March 12, 1664 grant to the Duke of York from his brother, King Charles II of England, of the territory which now comprises, inter alia, the states of New York and New Jersey. The Duke, in turn, almost immediately devised a tract, called "New Caesarea" or "New Jersey," to Lord Berkeley and Sir George Carteret (PE 280 at 12).¹ By 1676, Berkeley and Carteret had partitioned their holdings into West Jersey and East Jersey, respectively. Id. Two years later, Carteret devised East Jersey to certain trustees, who in turn parceled the holding to twelve proprietors. On November 23, 1683, confirming the rights of these East Jersey proprietors, Charles II described the eastern riparian limits of the territory, in pertinent part, in the same language as the original 1664 grant, i.e., as "extending eastward and

¹ Parenthetical references prefaced by "PE" refer to numbered items on plaintiff's evidence list, followed by specific page references within those items; "DE" denotes items on defendant's evidence list; and "R" indicates a citation to the Special Master's Final Report.

northward all along the sea coast and Hudson's river," within specified northern and southern limits (id.) (emphasis added).

The province of New York, meanwhile, was not similarly limited to the eastern shore of the Hudson by the terms of any devise; it retained the river within its territorial boundaries because of the Hudson's inclusion, as an entity, within the original royal grant to the Duke (PE 280 at 11). Accordingly, as early as 1691, Chapter 17 of the Colonial Laws of New York for that year located the three Oyster Islands, one of which later became known as Ellis Island, in the City and County of New York. By the time a new Charter for the City was issued on January 15, 1730, by John Montgomerie, then governor of both New York and New Jersey, the City's limits were not only defined as including the Oyster Islands, but as extending to at least low-water mark on the opposite, or East Jersey shore (DE 824 at 137, 146-147). There is no evidence that during this pre-Revolutionary period the proprietors of East Jersey, or any other governmental authority within that territory, attempted to counter-assert jurisdiction over the Hudson River or Bay and any island, like Ellis Island, west of center.²

² In 1721, the West Jersey proprietors, on the other hand, had sought to settle their boundary and assert rights to at least the midpoint of the Delaware by consulting with Crown counsel (PE 271 at 55) -- only to be told that (unlike the grant of the Hudson to the Duke of York) the royal grants on both sides of the Delaware ran only to the river. Hence, at that time, the Delaware River itself, and any islands in it, "remained in the crown" and were within the territorial boundaries of neither New Jersey nor Pennsylvania. Corfield v. Coryell, 6 Fed. Cases 546, 554 (4 Wash. C.C. 371) (1823); State v. Davis, 1 Dutcher 386, 387 (N.J. Sup. Ct., 1856).

After New York's emergence as a state at the conclusion of the Revolution, Ellis Island remained identified as part of the State and City of New York. In Chapter 63 of the Laws of 1788, setting up the counties of the State, New York County, which embraced New York City, still included Ellis Island. Three years later, legislation establishing wards within the City placed Ellis Island in the First Ward (L. 1791, ch. 18). By 1794, Ellis and Bedloe's Islands had been transferred by the City of New York to the State of New York, together with the soil between high-water and low-water mark surrounding Ellis Island (DE 740; 938 at 23). The grants were subject to a reverter whenever "the Premises shall no longer be used for the purposes of fortification." Id.

The 1794 cession, as well as a further cession by the State of New York to the federal government in 1800 and, finally, the State's conveyance of full title in 1808, had no effect on the status of Ellis Island as part of New York City. Even as legislation was passed in 1803, 1817, and 1825 to accommodate the need for new wards within the City, Ellis Island continued to be deemed part of the First Ward (L. 1803, ch. 29; L. 1817, ch. 285; L. 1825, ch. 195). Furthermore, Chapter 2, Title 1, sec. 2, par. 5 of the New York Revised Statutes (1829) described the County of New York as including Ellis Island, and Chapter 2, Title 5, sec. 1 described the City of New York as all of that part of the State within the bounds of the County of New York, placing Ellis Island in the City of New York.

Nor did ratification of the 1834 Compact change the situation: the description of Ellis Island in the 1829 statutes appears, unchanged, in the 1836, post-Compact version. See, Chapter 2, Title 1, § 5 and Title 5, § 1, N.Y. Rev.

Stat. (1836). Likewise, after New York State, in 1880, relinquished title and jurisdiction over the subaqueous lands surrounding Ellis Island to the United States (with the reservation that the cession of jurisdiction would continue only as long as the United States owned the Island and the adjacent subaqueous lands), Ellis Island continued to be legally part of the City of New York. See, e.g., New York Consolidation Act of 1882 (L. 1882, Ch. 410, § 1); the Greater New York [City] Charter (L. 1897, Ch. 378; L. 1901, Ch. 466, § 1). Again, that status continued despite New Jersey's 1904 transfer of subaqueous lands (without retention of any reversionary interest), even as the Island's size was increased by the filling operations undertaken by the federal government after 1890, and it remains in effect today. See, Administrative Code of the City of New York, § 2-202(1).³

SUMMARY OF ARGUMENT

As the State of New York has emphasized in its Exceptions to the Special Master's Report, Article Second's provision that Ellis Island, as an entity, would remain under the sovereign jurisdiction of New York effectively disposes of New Jersey's current claims to the landfilled areas based on Articles First and Third. The Report reaches the contrary conclusion, inter alia, because it ignores the contemporary meaning of the language chosen by the drafters, language which is based on concepts of sovereignty and jurisdiction current in the late 18th and

³ We note, in passing, that the only post-1834 attempt by a political subdivision of the State of New Jersey to claim Ellis Island for its own was the 1924 decision of a single Hudson County administrator to add both Ellis and Bedloe's Islands to the county's tax rolls as exempt property. See, State of New York's Exceptions at pp. 33, 38.

early 19th centuries. Instead of looking for guidance in construing the Compact to how the nature and legal viability of the claims which gave rise to the underlying dispute might have dictated their resolution, or to how the drafters were influenced by leading commentators, such as Vattel, whose theories are referenced in the 1807 and 1827 formal correspondence of the Commissioners, the Report begins with an abstract construct and then disregards any internal or external evidence that might not fit within this model.

When the proper analysis is undertaken, it becomes clear that the Compact incorporates Vattel's discussion of how, in sovereign states, rights of property may be separated from sovereign, or jurisdictional, powers. The rights of property which can be so separated are of the type which belong to an individual in the state, as distinct from the "high domain," which can never be separated. However, a state cannot possess the "high domain" -- or sovereign rights of property -- without also possessing the power of command, or jurisdiction. In Article Third, the drafters of the Compact gave exclusive rights of property with respect to the underwater lands west of the boundary to New Jersey, but granted to New York the crucial power of command, or "exclusive jurisdiction," over the same territory. In so doing, the drafters would have understood that they were establishing a situation in which New York held sovereign powers over the underwater lands up to the low-water mark on the Jersey shore. This is confirmed by the fact that the Compact grants New Jersey similar sovereign control, or "exclusive jurisdiction," over any improvements "to be made" on its shore, a grant which would have been unnecessary if, as the Report contends, that State already possessed sovereign power over the underwater lands west of the midpoint boundary.

Under the scheme set out in the Compact, New York also possesses sovereign rights with respect to the landfilled portions of Ellis Island, which were constructed on the very same underwater lands, and in the very same waters, over which the Compact gives that state "exclusive jurisdiction" or control. However, assuming, arguendo, that New York's power were less than sovereign in nature, i.e., assuming that it is properly characterized as the "police power" suggested by the Report, the Report still does not explain why that power should suddenly be negated by the fact that the underwater lands have been reclaimed. Moreover, even under a theory of New Jersey as sovereign, not much is left of the general sovereign power after subtracting the sweeping "police power" specifically granted to New York over the underwater lands, whether filled or in their original state.

Article First presents no obstacle to these conclusions. Far from establishing an "invariable" boundary, and hence allegedly investing New Jersey with absolute sovereign rights over the territory indicated, the Compact itself contains an "exception" clause indicating that variances will follow. The Report simply ignores this fact.

In short, interpreting the Compact in the context of the applicable principles of law as they were understood at the time of its drafting, and turning to contemporary commentators for guidance, as this Court has indicated is proper, Alabama v. Georgia, 64 U.S. (23 How.) 505, 513 (1859), compels the conclusion that the Special Master's resolution of this case in favor of New Jersey cannot stand.

ARGUMENT

PROPERLY INTERPRETED BOTH IN LIGHT OF THE CONTEMPORANEOUS LEGAL CLIMATE, AND IN LIGHT OF THE NATURE OF THE DEBATE BETWEEN THE TWO STATES REFLECTED IN THE 1807 AND 1827 CORRESPONDENCE OF THE COMMISSIONERS, THE LANGUAGE OF THE 1834 COMPACT COMPELS THE CONCLUSION THAT NEW YORK, RATHER THAN NEW JERSEY, ULTIMATELY POSSESSES SOVEREIGN POWERS OVER THOSE PORTIONS OF ELLIS ISLAND CREATED BY FILL IN THE POST-RATIFICATION YEARS.

(1)

As the City of New York reads the Special Master's Final Report (the "Report"), it upholds New Jersey's claims to sovereignty over Ellis Island on the ground that the territorial boundary set by Article First of the 1834 Compact, a boundary which is described in the Report as "unambiguous" (R31) and "unvarying" (R55), *ipso facto* endows New Jersey with an equally "unambiguous" and "unvarying" sovereignty over everything to the west of that line. Such an interpretation must, of course, completely ignore the qualifying phrase used by Article First with respect to the establishment of this "unambiguous" boundary: the boundary is stated to be the midpoint of the Hudson River and New York Bay, "except as hereinafter otherwise particularly mentioned." If, as the Report

maintains, sovereignty is both defined by and flows inexorably from boundary, those qualifying words can only mean that the Compact explicitly provides for situations in which, because other Articles effect a boundary change, sovereignty is similarly affected.

The Report implicitly admits that this is the case with respect to Article Second's proviso that New York "shall retain its present jurisdiction of and over" Ellis and Bedloe's Islands, as well as its "exclusive jurisdiction" over the other islands west of Article First's boundary "now under the jurisdiction of that state." This, the Report concedes, means that, under the Compact, sovereignty, *i.e.*, what is termed in Article Second "exclusive jurisdiction," over lands geographically located within New Jersey's territorial limits was vested in New York (R60). Despite being characterized as "unvarying," the Article First boundary was thus obviously changed to that extent.

The "exclusive jurisdiction" which signifies sovereignty in Article Second reappears in Article Third, where it is granted to New York with respect to the waters and the land under water west of Article First's midpoint boundary, up to the low-water mark on the Jersey shore; and to New Jersey over the piers, wharves, and improvements annexed to its fast lands and projecting out into the same waters. In this context, however, the Report insists that the adjective "exclusive" somehow loses its primary meaning, becoming a qualifier denoting a power less than sovereign (R89). No reason is provided for this alleged change in meaning, other than the assertion that it must be so if the Article First boundary is indeed absolute and unvarying (R89). In fact, the Report recognizes that "[t]he plain and ordinary import of jurisdiction without

exception is the authority of a sovereign" (R60) (emphasis added); agrees that the "exclusive jurisdiction" referred to in the opening paragraph of Article Third "should be interpreted to convey a similar meaning in Article Second" (R60); concedes that what is referred to by the term in Article Second is sovereignty (R60); but states that "exclusive" is used as a qualifier (R89), and therefore, in Article Third, cannot indicate sovereignty (R60).

Given the primacy of the terms "boundary," "jurisdiction," "sovereignty," and "rights of property" in the Report's analysis of the Compact, the City of New York, in its role of amicus curiae, has chosen to concentrate its efforts in this brief on elucidating how the drafters of the Compact would have understood these concepts, as this can be determined from an analysis of the nature of the dispute the Compact was intended to resolve and the contemporaneous legal climate. This approach is dictated by almost two centuries of decisions by this Court indicating that where an agreement involves an interstate dispute regarding a river, the agreement "must be interpreted by the words of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists [commentators] in reference to the settlement of controversies between nations and states as to their ownership and jurisdiction on the soil of rivers...." Alabama v. Georgia, 64 U.S. (23 How.) 505, 513 (1859). Cf., Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 722 (1838); Massachusetts v. New York, 271 U.S. 65, 87 (1926). In other words, although we agree with the State of New York's persuasive argument that the doctrine of laches, as well as principles of prescription and

acquiescence, demand rejection of the Special Master's conclusions, it is our position that these issues need not be reached if the Compact is properly interpreted as a matter of law.

(2)

In discussing the 1834 Compact in context, it is important to note that during the immediate post-Revolutionary period, many former colonies, now States, were attempting to settle border disputes by means of compacts or treaties. In 1783, New Jersey itself entered into just such an agreement with Pennsylvania concerning the Delaware. Because, as noted in footnote 2, supra, the Delaware river and bay, unlike the Hudson, had remained in the Crown, "ungranted to any of the colonies," these bodies of water "became vested in the adjoining states at the declaration of independence, so that the boundary of each extended to the middle." State v. Davis, supra, 386 Dutcher at 387. By the 1783 compact, the two states agreed, inter alia, to the exercise of "concurrent jurisdiction" over the water itself, but not over the lands under water on their respective sides of the boundary. Id. Since boundary was not an issue, retention by each state of exclusive jurisdiction over its underwater lands must here have been the operative indicia of sovereignty -- and this exclusive jurisdiction, of course, is what New York retained over the underwater lands specified in Article Third.

This point is underlined by reference to Vattel's The Law of Nations, a contemporary legal treatise cited by the Commissioners from New Jersey at various points during both the 1807 and the 1827 negotiations, see, e.g., PE 271 at 20, 44, and relied upon by this Court at least as early as 1820. See, e.g., Handley's Lessee v. Anthony, 18 U.S. (5

Wheat.) 374, 379-80 (1820). Vattel defines sovereignty as political authority, or the right of a nation to govern its own body. Law of Nations, Bk. I, c.1, §§ 2, 5 (J. Chitty, ed.)(7th Am. Ed., 1849). Sovereignty also encompasses "empire," or the right of "command" and regulation in all places of the country belonging to the nation. Id. at c.20, § 245. "Empire," in turn, is synonymous with the term "jurisdiction," and each nation "naturally possesses it over the whole or part of which it possesses the 'domain.'" Id. at c.22, § 278.

According to Vattel, "the empire and the domain or property, are not inseparable in their own nature, even in a sovereign state." Id. at 295 (emphasis in original). In language immediately following this statement which equates sovereignty with empire and jurisdiction, Vattel writes: "As a nation may possess the domain or property of a tract of land or sea, without having the sovereignty of it, so it may likewise happen that she shall possess the sovereignty of a place, of which the property, or the domain, with respect to use, belongs to some other nation." Id. at § 295 (emphasis added). Later in the treatise, he expands on this observation by pointing out that a state "cannot have full and absolute domain of a place where she has not the command" -- or, put differently, where the state does not possess the "empire" or jurisdiction. Id. at Book II, c.7 § 83. Thus, Vattel makes a distinction between "high domain," which is "nothing but the domain of the body of the nation," and which is "everywhere considered inseparable from sovereignty," and "useful domain," which can be severed. "Useful domain" is confined to "the rights that may belong to an individual in the state," and "nothing prevents the possibility of its belonging to a nation in places that are not under her jurisdiction." Id. at § 83.

These concepts are directly reflected not just in the 1783 compact between New Jersey and Pennsylvania discussed above, but in other treaties of the same era -- notably, the Hartford Compact, considered by this Court in Massachusetts v. New York, 271 U.S. 65 (1926), in which it was held that New York ceded to Massachusetts private ownership of, but not sovereignty or jurisdiction over, the western half of territory claimed by both states; and in the 1782 Decree of Trenton, which, although it stated that "Connecticut had not the jurisdiction over the disputed territory," did not prevent that state from claiming "the right of soil" for another eighteen years. Rhode Island v. Massachusetts, 37 U.S. 657, 724 (1838). While the separability of sovereign power and property interests is certainly, we submit, reflected in the 1834 Compact, Vattel is perhaps even more useful in his explicit equation of sovereignty and jurisdiction -- an equation which appears not only in the extant records of the 1807 and 1827 negotiations, but in the language of the Compact itself.

(3)

As reflected in the official correspondence of the Commissioners appointed in 1807, New York took the position that the respective rights of each state "must in some measure serve as the grounds of any proposed compact" (PE 222 at 1, 4). According to New York, "coeval with the commencement of the colonial governments of the two states," it had actually and constantly exercised and possessed "jurisdiction" over the Hudson River and New York Bay as part of its rightful territory. Id. By the right of jurisdiction, New York specifically stated that it meant the sovereign right of government, as distinct from an estate or property interest

in territory (PE 222 at 19, 31). According to New York, New Jersey was entitled to "jurisdiction" only to the extent she was entitled to property, and the territorial grant from the Duke of York to Berkeley and Carteret was bounded by the western shores of the Hudson and New York Bay (PE 222 at 4).

It was New Jersey's basic position that, by virtue of the Revolution, it had become vested with authority to "exercise jurisdiction" over the Hudson "in such manner as belongs to a sovereign" (PE 222 at 3). Looking to the model of her Delaware River boundary, New Jersey argued that if New York was correct, New Jersey would also be deprived of all "jurisdiction" on her shores adjacent to that river, which was patently not the case (PE 222 at 38). Furthermore, according to New Jersey, when King Charles made his original grant to the Duke of York, it included the grant of the river, which thereby became the private property of a subject, permitting future grantees to hold to the center (PE 222 at 11). See, Bell v. Gough, 23 N.J.L. 624, 662 (1852). When the Duke in turn became king, the river reverted to the Crown, which, at the Revolution, impliedly yielded all "jurisdiction" over the river to the colonies (PE 222 at 20 et seq., propositions 6 & 7).

Alternatively, New Jersey argued (1) that the early confirmatory deeds to Berkeley and Carteret, which stated that they should have "free use" of all bays, inlets, shores, etc. within the granted territories, included the Hudson within that description (PE 222 at 16); (2) that the state had "uninterruptedly," as "far back as memory of man extends," itself exercised "jurisdiction" over its frontage on the river and bay, below low-water mark, for docks, wharves, piers, ferries, and fishing weirs (PE 222 at 16,

34); and, interestingly, (3) citing Vattel, New Jersey suggested that, given the separability of the "empire" of a country and its right of property in the soil, it did not necessarily follow that "jurisdiction" over New Jersey's shores and harbors belonged to New York, even if the property belonged to that state (PE 222 at 20).

As the negotiations deteriorated, New Jersey asked for an "accommodation line" (PE 222 at 40). New York responded that it preferred to retain the high-water mark on Jersey's shores (PE 222 at 40). New Jersey then suggested that a line be run down the middle of the river and bay, but leaving the Oyster islands within the "jurisdiction" of New York (PE 222 at 41). New York would not agree to the mid-line of the Hudson as the "line dividing the jurisdiction," but announced that it would consider an accommodation with respect to the "benefit and use" to accrue to New Jersey's citizens. *Id.* On October 7, 1807, the negotiations broke off with New Jersey's announcement that it was unwilling to "ask and receive" benefits from New York.

What is interesting and important about this exchange is (1) the paucity of use of the words "sovereign" or "sovereignty," terms which do not appear at all in the 1834 Compact, the word "jurisdiction" being used instead to discuss that concept; (2) the references to Vattel, who in fact frequently used "sovereignty" and "jurisdiction" synonymously and who also discussed the separability of jurisdiction and property in sovereign states; and (3) New Jersey's clear concern for control of the wharves, piers, and other developments on its own shores. See, State v. Babcock, 30 N.J.L. (1 Vroom) 29, 32-33 (1862) (control of these improvements identified as that state's motivating

concern in pressing its claims).

(4)

A number of important decisions affecting the legal viability of New Jersey's position were issued between 1807, when the first Commissioners were appointed, and 1827, when each state again designated representatives to attempt a resolution of the issues. In Handley's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820), this Court, citing Vattel, stated that, "[w]hen a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when ... one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river is its boundary." Id. at 379 (emphasis added). The Court also pointed out that a country bounded by a river extends to the low-water mark. Id. at 383. Cf. State v. Babcock, supra, 30 N.J.L. at 33.

The following year, one of New Jersey's own courts rejected the validity of the state's claim, through the proprietors, to rights over the river and bay, holding that, under the grant from the king to the Duke of York, the Hudson did not become a private river, with the subjects on each side holding to the middle. Arnold v. Mundy, 6 N.J.L. 1 (1821). This Court later adopted a similar position in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). Cf. Bell v. Gough, supra, 23 N.J.L. at 662.

Finally, in 1823, a federal appellate court held that the claims of the proprietors of West Jersey to the Delaware

River and Bay were limited by the terms of the original grant from the Duke of York, which, on its face, extended only to the lands on the eastern side of the river. Corfield v. Coryell, 6 Fed. Cases 546, 553-554 (4 Wash. C.C. 371) (1823), citing Handley's Lessee, *supra*. Cf., State v. Davis, *supra*, 1 Dutcher at 387 (Elmer, J., describing and approving the decision). The Court also rejected the idea that language describing a grant of "all rivers" could enlarge the limits of the state, holding that these were confined to rivers within the boundaries of the original grant, not border rivers. *Id.* The Court further stated that, although the right of the Crown to the Delaware had been extinguished by the Revolution, New Jersey would hold to the middle only if there was no better title existing in some other state. *Id.*⁴

(5)

When the new set of Commissioners began communicating with each other in June 1827, both states were aware of the decisions in Arnold v. Mundy, Corfield, and Handley's Lessee (PE 280 at 13; PE 271 at 42, 57). Cf. State v. Babcock, *supra*, 30 N.J.L. at 33. New York acknowledged that Handley's Lessee would make New Jersey's border the low-water mark on the western shore of the Hudson (PE 280 at 14), but included in its First Set of Propositions only the proposal that New Jersey "shall enjoy and exercise exclusive jurisdiction on all the wharves and land now made, or which may hereafter be made ... to the actual line of low water" (PE 280 at 2), plus limited service of process. *Id.* New Jersey countered with a demand that

⁴ Such better title to a portion of the Delaware River was in fact later found in the State of Delaware. See, New Jersey v. Delaware, 291 U.S. 361 (1934).

the "waters of the Hudson River," within a geographically delimited area, "be the boundary between the two states and a common highway," with concurrent jurisdiction. It further proposed that Ellis Island and various other islands, "to low water mark of the same, be held to be and remain within the exclusive jurisdiction of the State of New York" (PE 280 at 3).

In the Second Set of Propositions, New York continued to state that New Jersey could have "exclusive jurisdiction" to low-water mark on her own shores, and that New Jersey's inhabitants could enjoy the right of the fisheries on the west side of the river "in common with the inhabitants of the State of New York;" provided for limited service of criminal and civil process; and stated that the right to exercise all "jurisdiction, power, and authority over the said waters, other than such as are herein secured to the state of New Jersey," would lie with New York (PE 280 at 3-4). New Jersey's response was to propose, inter alia, that the "waters" of the Hudson (no longer geographically delimited) be the "boundary," with "exclusive jurisdiction" over them reserved to New York, except that New Jersey would have "exclusive jurisdiction" over the docks and wharves on its own shores (with no mention of a limitation to low-water mark) (PE 220 at 4). Ellis Island is not mentioned -- presumably because New York's "exclusive jurisdiction" over the waters would include any such lands.

When the Third Set of Propositions was tendered, New York's position had not changed much, except that, again without mentioning a boundary, it proposed exclusive jurisdiction of New Jersey not only in the "wharves and land now made, or which may be hereafter made," on its

own shores, but also "to low water mark along the whole of the said shore" (PE 220 at 5). It also proposed that New Jersey have the right to regulate the fisheries on her shore. Id. As pertinent here, New Jersey's proposal again suggested that the "waters" of the Hudson be the boundary; relinquished all claims to Staten Island and the other islands; and provided for concurrent jurisdiction in the service of process (PE 220 at 6).

The Fourth (and last) Set of Propositions differed only in minor details from the Third. After they had been exchanged, and apparently out of patience, New Jersey informed New York that, based on the "true construction of the original grants" and the rights acquired after the Revolution, it claimed: (1) a "right of territory and jurisdiction" to the middle of the Hudson; (2) Staten Island and the three Oyster Islands (including Ellis Island), as allegedly included within its territory by the same grants; and (3) the waters between Staten Island and the mainland (PE 220 at 8). According to New Jersey, New York was only willing to accord to New Jersey certain favors and privileges she already enjoyed (id.). New York admitted as much, and negotiations broke down with suggestions by New Jersey that the matter be referred to an impartial tribunal (id. at 9).

As in the case of the 1807 discussions, what is interesting here is the approach to the problem in terms of "jurisdiction" rather than "sovereignty." And what is particularly striking is that the term "exclusive jurisdiction" is used by both states in reference to New Jersey's rights over her wharves and other improvements to low-water mark -- or, after Handley's Lessee, to what would have been considered that state's sovereign boundary.

"Exclusive jurisdiction," therefore, is again used here as synonymous with sovereignty, and reappears, we submit, in the same guise in the 1834 Compact itself.

(6)

In turning to the Compact, we note that it must be construed not only against the conceptual backdrop of the contemporary legal and political debates which led to its genesis, but according to accepted principles of statutory interpretation. The Compact must, in other words, be interpreted as a whole, Gustafson v. Alloyed Co., Inc., ___ U.S. ___, 115 S. Ct. 1061, 1067 (1995), with any given term construed consistently throughout. Id. Indeed, this Court has recently emphasized that it is a "normal" rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." Id.

Before discussing the application of these principles, it may be wise to review again the Compact's main provisions. Article First states that the "boundary line" between the two states "shall be the middle of the said [Hudson] river, of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned." Contrary to the position taken in the Report, this language clearly fixes a part of the boundary as the middle of the river and of various other waters, but it leaves the other parts of the boundary to be defined as "otherwise particularly mentioned." That the boundary is not limited to the specific provisions of Article First, but is determined by that article and by whatever exceptions are "particularly mentioned," is plain from the language of Article First itself. Any other meaning would make the

article absurd. If the boundary were confined to the middle of the river, etc., the exception provision would be meaningless. It simply could not apply to anything in the rest of the agreement. Contrary to the principle that no provision in a statute should be treated as meaningless, see, e.g., Boise Cascade v. U.S.E.P.A., 942 F.2d 1427, 1432 (9th Cir. 1991), the Report's approach effects precisely this result.

The exception clause in Article First clearly relates to Article Second, which provides that New York shall "retain its present jurisdiction of and over Bedloe's and Ellis's Islands" and shall also retain exclusive jurisdiction over the other islands lying in the waters mentioned in Article First and "now under the jurisdiction of that state." The Report correctly concludes that this language refers to and confirms New York's sovereignty over the enumerated islands, although it still will not concede that Article Second constitutes the change in boundary recognized in Article First.⁵

Portions of Article Third also clearly come within the exception in Article First. This article provides that New York shall have and enjoy "exclusive jurisdiction" of and over the waters of the bay of New York and all the waters of the Hudson River lying west of Manhattan Island and to the south of the mouth of Spuytenduvel creek, and

⁵ New York's highest court held otherwise in People v. Central Railroad Co., 42 N.Y. 283 (1870), dism'd, 79 U.S. (12 Wall.) 455 (1872), where it pointed out that the exception in Article First "limits and restricts the boundary line," followed by the observation that the Commissioners established the boundary line between the two states "as fixed and defined in said first and second articles of said treaty." Id. at 294 (emphasis added).

"of and over the lands covered by said waters to the low water-mark on the westerly or New Jersey side thereof." This provision is made subject to specific rights of property and jurisdiction of New Jersey. The first gives New Jersey an exclusive right of property in "the land under water lying west of the middle of the bay of New York and west of the middle of that part of the Hudson river which lies between Manhattan Island and New Jersey." The second deals with wharves, docks and improvements made or to be made on the shore of New Jersey and to vessels aground on that shore or fastened to any such dock, placing them under the "exclusive jurisdiction" of New Jersey. The third gives New Jersey the exclusive right of regulating fisheries on the westerly side of the middle of the waters involved, provided that navigation not be obstructed or hindered.

Interestingly, these latter two rights are taken directly from the Third and Fourth Sets of Propositions submitted by New York in 1827, which New Jersey objected to on the ground that (1) they were made on the assumption that New York had full sovereign rights of territory and jurisdiction to the low-water mark on the Jersey shore; and (2) they did not grant New Jersey anything other than she already had -- i.e. "exclusive," and therefore "sovereign," jurisdiction down to low-water mark on those same shores (PE 220 at 8-9). The identical analysis is applicable here. If, as the Report maintains, New Jersey obtained "sovereignty" over everything to the west of the boundary line by virtue of Article First, there would be no need to provide her with "exclusive jurisdiction" over the improvements on her own shores extending out into waters over which she already possessed sovereign powers.

Accordingly, far from being a sovereign or jurisdictional boundary, the boundary of Article First obviously serves, inter alia, as the demarcation point for the limits of the property rights in the lands under water elsewhere granted to New Jersey. See, State v. Babcock, supra, 30 N.J.L. at 31-32 (Elmer, J., commenting that the midpoint of the Hudson is New Jersey's boundary only "for some purposes," one of these being to indicate the limits of her ownership of Article Third's underwater lands). Under the Compact, New Jersey gained rights of property it did not otherwise possess, as well as rights of sovereign, or "exclusive," jurisdiction over the improvements which, after many years of wharfing out, had changed the natural coastal boundary existing at the time of the Duke of York's grant, extending that boundary further into the Hudson River and New York Bay. New Jersey could not have gained full sovereign rights over the underwater lands indicated in Article Third because "exclusive jurisdiction" over the same property was granted to New York. As Vattel put it, and as the drafters of the Compact would have understood, a state cannot have the "high domain," or sovereign rights of property, where another state or nation possesses the jurisdiction or "command." What New Jersey received under the Compact was the "useful domain," the property rights possessed by an individual citizen. Only these rights, according to Vattel, are separable, and clearly, under the Compact, property rights in the underwater lands have been separated from the rights of jurisdiction.

(7)

The Report articulates a variety of reasons for rejecting the conclusion that the "exclusive jurisdiction" over the underwater lands vested in New York in Article Third is sovereign jurisdiction, which by definition would give New York ultimate control over the same underwater

lands held by New Jersey in a proprietary capacity. We address these, and certain other relevant issues, seriatim.

First, the Report rejects any such interpretation on the ground that if New York's sovereign jurisdiction, and hence its boundary, extended to the low-water mark on the Jersey shore (the limit of New York's exclusive jurisdiction stated in Article Third), the boundary would be subject to change, shifting as New Jersey reclaimed and filled in the lands along her shoreline. The Report finds such a result abhorrent, quoting this Court's observation in Georgia v. South Carolina, 497 U.S. 376, 396 (1990), that "a regime of continually shifting jurisdiction" does not "comport[] ... with the respect for settled expectations that generally attends the drawing of interstate boundaries" (R67). While the settled expectations in Georgia v. South Carolina, where the boundary was defined in relation to islands existing in 1787, would certainly have been disturbed by the appearance of new islands years later, the same is not true of the Compact: Article Third specifically envisions such shifts by providing that New Jersey possesses exclusive jurisdiction not only over the improvements on its borders existing in 1834, but over those "to be made."

Furthermore, the idea that jurisdictional boundaries may be affected by reclamation of subaqueous lands was not particularly shocking in the legal climate of 1834. As early as 1821, New York's highest court had ruled that, as between New York County and Kings County, the latter included all "made land" on the East River, even though this would change New York County's boundary, which, like New York's boundary here, extended to low-water mark on the opposite shore. Udall v. Trustees of Brooklyn, 19 Johns. 175, 178 (1821). The Court was even more

specific in a companion case, Stryker v. Mayor, 19 Johns. 178 (1821), pointing out that, under such circumstances, it was inevitable that "permanent erections, such as wharves and storehouses, may, from time to time, vary the line of jurisdiction." Id. at 180. Accord, Ross v. Mayor, 180 A. 866, 871 (N.J. Sup. Ct., 1935). More recently, the same principle has been applied to the sovereign boundaries between the United States and individual states on the coastal waters of this country. In United States v. California, 381 U.S. 139 (1965), this Court ruled that, when a state extends its land domain by reclaiming subaqueous lands on its seacoast, the fact that this would permit the state to unilaterally effect changes in the boundary between federal and state submerged lands was of no moment. Id. at 176-177.

In a second attempt to discount the idea that the "exclusive jurisdiction" which refers to sovereignty in Article Second somehow no longer carries that meaning in Article Third, the Report rejects any reliance on Vattel with the flat observation that the term "jurisdiction" can have several meanings, "not all of which imply sovereignty" (R58, note 20). We have no problem with this as a general statement regarding "jurisdiction," but it hardly does justice to the distinctions made by Vattel and the documented influence of his thinking on the drafters. Nor does it advance the argument when the issue is the meaning, not of "jurisdiction" in general, but of "exclusive jurisdiction." We have difficulty perceiving how the term "jurisdiction," when modified by the adjective "exclusive," can be considered anything but unqualified -- particularly since, when the Compact in fact wishes to indicate that it is referring to a limited exercise of power, as in Article Fourth's restriction of New York's power there to

quarantine laws, etc., it has no trouble doing so.

The problem, as we see it, is that the Report implicitly assumes that that possession of property or title is the controlling indicia of sovereignty. While it is often said that "ownership of land under navigable waters is an incident of sovereignty," Montana v. United States, 450 U.S. 554, 551, citing Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), possession of title in this context is considered an essential attribute of sovereignty only because it is "important to the sovereign's ability to control navigation, fishing and other commercial activity on rivers and lakes." Utah Division of State Lands v. United States, 482 U.S. 193 (1987). Accord, Montana v. U.S., supra, 450 U.S. at 552. See also, Idaho v. Coeur d'Alene Tribe of Idaho, U.S., 1997 WL 338603 (U.S.) at 16 (concurring opinion); Bell v. Gough, 23 N.J.L. 624, 684 (1852) (right of the sovereign to underwater property, while commonly termed a title, "is more properly a power over it, to . . . protect such lands for the common welfare . . .").

Under the Compact, the dispositive control was granted to New York, a fact which argues persuasively for the conclusion that sovereignty was vested in that state and that what New Jersey received was Vattel's non-sovereign rights of property. In any event, the power to regulate the underwater lands surrounding Ellis Island, whether in their filled or natural state, and whether that power is denominated "sovereign" or not, is surely in New York under Article Third -- with no indication there, or elsewhere in the Compact, that the dominant control so vested could in any way be interfered with by New Jersey. Indeed, if New Jersey possessed sovereign powers, they would be sufficient to override what was intended to be the

permanent and exclusive jurisdiction of New York over the waters and underwater lands west of the boundary, including those surrounding Ellis Island. Compare, Illinois Central Railroad v. Illinois, 146 U.S. 387, 453 (1892) (while a state, as sovereign, may abdicate its police powers by delegation to another governmental body, these can always be revoked and the navigable waters made subject to direct control).

All these objections to the approach taken by the Report are, of course, objections to the reasoning in Central R.R. Co. v. Jersey City, 209 U.S. 473 (1908) (Holmes, J.), which the Report recognizes has no stare decisis effect but whose rationale it obviously finds persuasive. We agree with the result reached in Central Railroad, which is fully supportable under the exclusive ("sovereign") jurisdiction over improvements on its shores, "made and to be made," granted to New Jersey in Article Third. As indicated above, however, we obviously have problems with the sweeping announcement that "boundary means sovereignty, since in modern times sovereignty is mainly territorial, unless a different meaning clearly appears," id. at 478-479, where that "different meaning" permeates the Compact; where other decisions of this Court establish that title is an incident of sovereignty only insofar as it supports the power of the state to exercise control, not vice versa; and where Central Railroad treats the phrase "except as hereinafter otherwise particularly mentioned" in Article First, which clearly provides for exceptions from the boundary and, hence, from the sovereignty allegedly established thereby, as though it did not exist. Application of Central Railroad's rationale to the issue of whether New Jersey possessed taxing authority over underwater lots connected to its own shores produced a sound result. Application of the same

reasoning to a much more complex situation, where the claim on the part of New Jersey is to artificially made lands annexed, not to its own shores, but to the sovereign territory of a sister state, has, we submit, produced a historically anomalous and radically unsound result.

The same can be said of the decision in People v. Central Railroad Co., *supra*, 42 NY 283 (1870), where the issue was whether New York could enforce its nuisance abatement laws with respect to a landfilled area extending into the Hudson from the Jersey shore. The decision against New York, which could have been reached solely, and properly, on the basis of Article Third, was instead grounded on the theory that whatever power New York possessed was subordinate to the sovereignty implicitly vested in New Jersey by virtue of Article First's boundary. To support its reasoning, in the face of a vigorous dissent, the majority was forced to admit that Article Third was, in its view, "unnecessary." *Id.* at 299. When it nevertheless addressed that provision, the majority then managed to misread it badly, stating that "under the concessions of jurisdiction over the waters of said river and bay," Article Third carefully provided that "no right should exist or be exercised [by New York] . . . over the bed of the river," *id.*, despite the language explicitly vesting "exclusive jurisdiction" in New York over the underwater lands to low-water mark on the Jersey shore. No such elimination or rewriting of Article Third is necessary if, as we believe we have demonstrated, the drafters of the Compact envisioned that the low-water mark which indicated the limits of New York's exclusive jurisdiction would change as the improvements "to be made," and subject to New Jersey's own grant of exclusive jurisdiction, were in fact realized. *Cf.*, Collins v. Promark Products, 763 F. Supp.

1204, 1206 (S.D.N.Y. 1991), aff'd, 956 F.2d 383 (2d Cir. 1992).

One final issue remains to be discussed. The State of New York's brief exhaustively demonstrates the error in the Special Master's refusal to make a factual finding that the practice of "wharfing out," *i.e.*, reclaiming submerged lands, was taken for granted at the time of the Compact (R92, note 39). This error is compounded by the Report's further insistence that the Compact itself "does not address expansion by landfill" (R92). To the contrary, Article Third's grant to New Jersey of exclusive jurisdiction over the improvements "made or to be made" on its shores establishes that the drafters not only were aware of the possibility, but clearly contemplated that landfilling operations would be undertaken. New Jersey itself recognized this fact below and suggested that, because the Compact does not specifically mention the possibility of future improvements of this sort involving the underwater lands surrounding Ellis Island, New York's jurisdiction over the fast land could not be presumed to extend to any landfill (N.J. Pretrial Mem. at 6-7).

This proposition simply miscomprehends the structure of the Compact. At issue in Article Third was jurisdiction over improvements abutting sovereign land in New Jersey and extending into waters over which New York had exclusive jurisdiction. In light of the potential for conflict between the two states' claims of jurisdiction in this area, the Compact's drafters saw a need to articulate the scope of New Jersey's rights of improvement in detail. (Parallel provisions are contained in Article Fifth, which addresses improvements upon the shore of Staten Island). However, future improvements upon Ellis Island -- which

was New York's territory, and which was surrounded by waters over which New York alone had exclusive jurisdiction -- would create no comparable conflict of jurisdiction, and therefore required no comparable clarification.

CONCLUSION

**FOR THE FOREGOING REASONS,
THE RECOMMENDATION THAT NEW
JERSEY BE DECLARED SOVEREIGN
OVER THE LANDFILLED PORTIONS
OF ELLIS ISLAND SHOULD BE
REJECTED, AND A DECREE SHOULD
ISSUE DECLARING THAT ELLIS
ISLAND, AS AN ENTITY, IS SUBJECT
TO THE SOVEREIGN JURISDICTION
OF THE STATE OF NEW YORK.**

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**EXCEPTIONS OF THE STATE OF NEW YORK
TO THE REPORT OF THE SPECIAL MASTER**

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QUESTIONS PRESENTED

1. Whether the Special Master erred in recommending that this Court declare that the State of New Jersey is sovereign over the landfilled portions of Ellis Island added after 1834, where the 1834 Compact between the States of New York and New Jersey provided that New York "retain its present jurisdiction of and over" Ellis Island without qualification, use of landfill to reclaim subaqueous land adjacent to fast land was widespread in New York Harbor at the time of the Compact, and a central purpose of the Compact was to confirm New York's control of commerce and navigation in New York Harbor.

2. Whether the Special Master erred in concluding that New York was not entitled by virtue of the doctrine of prescription and acquiescence to defeat New Jersey's claim of sovereignty over the landfilled portions of Ellis Island, where (a) New York presented extensive undisputed evidence of its prescriptive exercise of dominion over the landfilled portions of Ellis Island throughout the period during which Ellis Island served as a United States immigration station, and (b) New Jersey's evidence of its nonacquiescence in New York's exercise of dominion during this period is sparse, ambiguous and obscure.

3. Whether the doctrine of laches should apply to cases involving the enforcement of interstate compacts.

4. Whether, if laches applies to the present case, the Special Master erred in concluding that New Jersey's decades-long delay in commencing the present action did not give rise to laches by prejudicing New York's ability to offer a defense, where the delay rendered unavailable to New York both documentary evidence and testimony that, if available, might have resolved the issues raised by the case.

PARTIES

The parties to the action are listed in the caption.

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No. 120, Original

In The

Supreme Court of the United States

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**EXCEPTIONS OF THE STATE OF NEW YORK
TO THE REPORT OF THE SPECIAL MASTER**

The defendant State of New York excepts to the Final Report of the Special Master, dated March 31, 1997, and to the Supplement thereto, dated May 30, 1997, recommending that New Jersey be declared sovereign over the landfilled portions of Ellis Island.

JURISDICTION

The original jurisdiction of the Court is invoked under Article III, section 2 of the Constitution of the United States and under 28 U.S.C. § 1251(a) (1993).

STATUTE INVOLVED

The Compact between the State of New York and the State of New Jersey, enacted by Congress on June 28, 1834, 4 Stat. 708 (1834), appears as the Appendix to this brief.

STATEMENT OF THE CASE

At issue in this case is sovereignty over less than four one-hundredths of a square mile of artificial land -- the landfilled portions of Ellis Island, a 27.5-acre island lying west of the mid-point between New York and New Jersey in New York Bay.

In 1664, King Charles II of England granted to his brother, the Duke of York, the territory comprising the former New Netherland, including all of what is now New York and New Jersey and the waters between them (NY 866 pp 18-19).¹ That same year, the Duke of York conveyed to John Lord Berkeley and Sir George Carteret "all that tract of land adjacent to New England, and lying and being to the westward of Long Island, and Manhitas [i.e., Manhattan] Island, and bounded on the east part by the main sea, and part by Hudson's river" (NY 966 p 19). In 1691, the Colonial Assembly divided New York into twelve counties, including "The City and County of New York, to contain all the Islands commonly called Manhattan's Island, Manning's Island, the two Barn Islands and the three Oyster Islands; Manhattan's Island to be called the City of New York, and the rest of the Islands, the County" (NY 966 pp 32-33). Governor John Montgomerie's 1730 Charter to New York City identified the boundary of the South Ward of the City as running "across the North [i.e., Hudson] river so as to include Nutten Island Bedlows Island Bucking Island and the Oyster Island to low-water mark on the west side of the North river and so to run up along the west side of the said River at low water marke" (NY 743 p 281).

Sometime during the late 1700s, one Samuel Ellis obtained an island that had been one of "the three Oyster Islands" in 1691 and "Bucking Island" in 1730 (NY 938 p 19). The Island became known as Ellis Island, and remained part of New York City after the American Revolution (NY 938 p 20). In 1794, New York City granted to New York State "the Soil from high to low Waters Mark around Ellis's Isle for the purpose of erecting

¹ Parenthetical citations preceded by "NY" are to the numbered exhibits submitted by the State of New York, and those preceded by "NJ" are to the numbered exhibits submitted by the State of New Jersey. Parenthetical citations preceded by "T" are to the trial transcript, those preceded by "R" are to the Final Report of the Special Master, and those preceded by "S" are to the Supplement to the Final Report.

Fortifications for the Defence of this City" (NY 742). New York State, in turn, provided in 1800 that Ellis Island and nearby Bedloe's (subsequently Liberty) Island "shall hereafter be subject to the jurisdiction of the United States: Provided, that this cession shall not extend to prevent the execution of any process, civil or criminal, issuing under the authority of this State" (NY 83). In 1808, New York State, having obtained title to Ellis Island, conveyed its right, title and interest to the United States (NY 92). The conveyance was made "on the express condition of [the Island's] reverting to the people of [New York] in case [it was] not applied to the purposes" of "providing for the defence and safety" of the Port and City of New York (NY 85, 92). Thereafter, the United States constructed a fortification known as Fort Gibson on the Island (NY 938 p 26).

In the early 1800s, New Jersey took the position that the boundary line between New York and New Jersey lay at the mid-point of the waters between the two states (NJ 266). In New York's view, the River and Bay in their entirety were part of New York by virtue of the colonial grants (NJ 265). Commissioners from the two states attempted to settle the dispute, without success, in 1807 and 1827 (NJ 260, 280). New Jersey then filed a suit in this Court in 1829, seeking establishment of New Jersey's "rights of property, jurisdiction and sovereignty west of the mid-point of the waters of the Hudson River and New York Bay" (NJ 293). In its complaint, New Jersey conceded that, while the states were colonies, New York had taken possession of the islands "in the dividing waters between the two States," and "that the possession thus acquired by New York, ha[d] been since that time acquiesced in" by New Jersey (NJ 293). The Court issued an opinion and order asserting its jurisdiction over the case in 1831. *New Jersey v. New York*, 30 U.S. (5 Pet.) 284 (1831).

In 1833, Commissioners appointed by New York and New Jersey produced a Compact that was adopted by the Legislatures of both states (NJ 307-313) and enacted by Congress as a statute in 1834 (NJ 322). Article First of the Compact provided that "[t]he boundary line between the two states . . . shall be the middle of the [Hudson] river [and] of the Bay of New York." Under Article Third, New York received "exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of the Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof," subject to certain "rights of property and of

jurisdiction of the state of New Jersey," including New Jersey's "exclusive right to property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan and New Jersey." Article Second of the Compact provided that "the state of New York shall retain its present jurisdiction of and over Bedlow's [sic] and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state."

At the time of the Compact, Ellis Island's area was between 3 and $3\frac{3}{4}$ acres at high water, and between $4\frac{1}{2}$ and $6\frac{1}{2}$ acres at low water (T 2952). The United States Army remained in Fort Gibson on Ellis Island until 1861, when the fort was dismantled and a naval powder magazine established (NY 74 p 3). In 1891, Congress brought immigration under federal control.² The federal government selected Ellis Island as the immigration station for the Port of New York and set about expanding the Island by means of artificial landfill. When Ellis Island opened as an immigration station on January 1, 1892, its area was approximately 11 acres (R App F).

On June 15, 1897, the Ellis Island immigration station was entirely destroyed in a fire (NY 74 p 215). Congress immediately appropriated funds to rebuild "Ellis Island, New York," and gave authorization to enlarge Ellis Island beyond its then 14-acre size. 30 Stat. 113 (1897). This enlargement took the form of an extension of some three acres of filled land, on which was built a hospital, operated by the United States Marine Hospital Service, the predecessor of the Public Health Service (NY 74 pp 576, 1212, 1223-24). The new landfill and the preexisting land parallel to it were connected at one end by underwater fill and by a ferry house built on pilings embedded in the fill (T 2233, 2972). The entirety of Ellis Island now formed a "U" shape, with the ferry house at the bottom of the U, the parallel rectangles of the pre-1897 Island and the new extension as the arms of the U, the waters

² Authority over immigration was first placed in the Bureau of Immigration within the Department of the Treasury, 26 Stat. 1084 (1891), then transferred to the Department of Commerce and Labor in 1903, to the newly-created Department of Commerce in 1913, and to the Justice Department in 1940 (NY 74 pp 53, 489, 892). What is now the Immigration and Naturalization Service has existed under various names and in various administrative configurations (T 1345-46), all of which are referred to in this brief as INS.

of the "ferry basin" inside the U, and the open waters of New York Bay at its top. The new Ellis Island immigration station opened in late 1900; the hospital opened in 1902 (NY 952 pp 104, 503). The new landfill containing the hospital was commonly referred to as "Island No. 2" (NY 626).

Soon after the hospital opened, the authorities on Ellis Island recognized the need for a separate "contagious disease hospital" to be located some distance from the main hospital (NJ 345). In 1903 Congress appropriated funds for this hospital, which was built on a new four-acre strip of landfill parallel to the existing Island (NJ 355). 32 Stat. 1084 (1903). When the contagious disease hospital opened in 1911, the landfill it occupied was connected to the existing Island by a plank gangway constructed on piles (NY 74 p 608; NY 952 p 507). This landfill became known as Island No. 3 (NY 662).

Between 1900 and 1921, nearly 16 million immigrants arrived in the United States at Ellis Island (NY 952 p 6). In the 1920s, changes in the immigration law, including quotas for immigrants and the provision for inspection and qualification of immigrants in their countries of origin, *see* 43 Stat. 153 (1924), 42 Stat. 5 (1921), altered the role of Ellis Island in American immigration. After 1924, Ellis Island functioned principally as a center for the assembly, detention and deportation of aliens who had entered the United States illegally or had violated the terms of their admission (R App F). Ellis Island itself continued to grow, as the subaqueous land between the two hospital extensions was filled during the 1920's, and additional landfill was placed on the northern side of the Island in the 1930's (NY 74 p 1358). But Ellis Island's role as an immigration station declined. During World War II, the United States Coast Guard occupied Ellis Island (T 2436). The Island closed as an immigration station at the end of 1954 (NJ 108).

After the immigration station closed, Ellis Island was transferred to the federal General Services Administration (GSA), which in 1955 declared it to be surplus public property (NJ 393). GSA made unsuccessful attempts to sell the Island to private interests (NY 74 pp 1147-1151). In 1960, the United States Senate Subcommittee on Intergovernmental Relations of the Committee on Government Operations conducted hearings about Ellis Island (NJ 143), and on May 11, 1965, a Presidential Proclamation made Ellis Island part of the Statue of Liberty National Monument (NJ 163). The National Park Service (NPS) assumed control over Ellis Island shortly

thereafter (NY 78). Over the next decade, as Congress failed to appropriate funds for Ellis Island, conditions on the Island deteriorated greatly due to vandalism and neglect (NJ 162, 163, 166). In 1976, Congress appropriated funds for Ellis Island rehabilitation, permitting restoration of the Island and its assumption of its present place in the national system of historic sites and monuments (NJ 394).

The restoration and reopening of Ellis Island began to produce tax revenues. In 1984, individual New Jersey taxpayers filed a lawsuit in New Jersey state court, naming both New Jersey and New York as defendants and contending that New York, unlike New Jersey, was levying sales tax on transactions occurring on Ellis Island and state income tax on businesses and persons working on the Island, thus allegedly violating the terms of the 1834 Compact (NY 950). New Jersey's answer acknowledged that only New York was exercising state taxing authority on Ellis Island (NY 951). In 1986, the Governors of New York and New Jersey executed a Memorandum of Understanding, taking note of the pending lawsuit³ and seeking to avoid "such conflicts" by creating a fund for the homeless to be financed, *inter alia*, by tax revenues attributable to Ellis Island (NJ 180). New York has never enacted a law to give effect to this Memorandum.

In 1986, a federal employee injured while performing maintenance work on the filled portion of the Island commenced an action in the Southern District of New York against the manufacturer of the machine he was using when he was injured. The manufacturer impleaded the United States. The viability of such a third-party action was governed by the applicable state law. New York law permitted such an action; New Jersey law did not.

The case reached the United States Court of Appeals for the Second Circuit, with both New York and New Jersey filing *amicus* briefs. The Second Circuit determined to apply New York law, relying principally on Article Second of the Compact, "which clearly provides that '[t]he State of New York shall retain its present jurisdiction of and over . . . Ellis' island [].'" *Collins v. Promark Products, Inc.*, 956 F.2d 383, 386 (2d Cir. 1992) (brackets and ellipsis in decision). While the United States "contend[ed] that

³The case was eventually dismissed. See *Guarini v. New York*, 521 A.2d 1362 (N.J. Super. Ct. Ch. Div.), *aff'd*, 521 A.2d 1294 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 484 U.S. 817 (1987).

'present jurisdiction' refers to the 3-acre version of Ellis Island as it stood in 1833 and not to the 27.5-acre version as it stands today," the court concluded that "[t]he language of the Compact concerns power over the *entity* known as Ellis Island and in no way implicates the size of the entity." *Id.* According to the court, "Ellis Island in its entirety is subject only to the jurisdiction of New York, under a specific provision of the Compact designed to preserve the *status quo ante* of New York jurisdiction." *Id.* at 387. The Compact, in the court's view, recognized New York's exercise of jurisdiction over Ellis Island "[f]or more than three centuries," with "[t]he 'present jurisdiction' language only acknowledg[ing] that government ownership carried with it some limited form of federal jurisdiction." *Id.*

In the wake of the Second Circuit's *Collins* decision, New Jersey, invoking the original jurisdiction of this Court, sought leave to file a complaint seeking, *inter alia*, a declaration that "the original natural" Ellis Island is "within the territory and jurisdiction of the State of New York," while "the balance of the island" is "within the territory and jurisdiction of the State of New Jersey" (Complaint p 15). On May 16, 1994, this Court granted New Jersey leave to file the complaint. *New Jersey v. New York*, 511 U.S. 1080 (1994). New York answered, contending that it had jurisdiction over all of Ellis Island by virtue of both the Compact's grant of "present jurisdiction" over the Island and its award to New York of "exclusive jurisdiction" over the waters of New York Bay and "the lands covered by" those waters (Answer). New York further contended that its long-time unopposed and unconcealed exercise of sovereignty and jurisdiction over Ellis Island meant that, "[b]y principles of prescription and acquiescence," New York "currently has jurisdiction and sovereign authority over Ellis Island in its entirety" (Answer). New York subsequently sought to amend its answer to raise the defense of laches (R 27).

The matter was referred to Paul Verkuil, Esq. as Special Master on October 11, 1994. 513 U.S. 924 (1994). On May 9, 1996, the Special Master denied both states' motions for summary judgment, and trial followed. On March 31, 1997, the Special Master issued his Final Report, concluding, *inter alia*, that "[t]he sovereign boundary of the States on Ellis Island lies at the division between New York's 'original' Island . . . and New Jersey's landfilled additions," that "[s]ince the Compact of 1834, New Jersey has exercised jurisdiction over her sovereign territory on Ellis Island, and [that] she has not acquiesced in New York's isolated acts of prescription over the landfilled portions of Ellis Island" (R 2).

The Special Master rejected New York's argument that it had jurisdiction over the filled portion of Ellis Island by virtue of the grant to New York, in Article Third of the 1834 Compact, of "exclusive jurisdiction of and over all the waters of the bay of New York . . . and of and over the lands covered by the said waters" (R 53-60, 63-80, 81-88). With respect to Article Second of the Compact, the Special Master rejected New Jersey's suggestion that New York's retention of its "present jurisdiction" over Ellis Island is a "geographical limitation on the size of Ellis Island in 1834," concluding that the term "refer[s] to the fact that Ellis Island was owned and operated by the United States at the time of the 1834 Compact" (R 62). The Special Master nonetheless concluded that Article Second does not give New York jurisdiction over the filled portions of Ellis Island. Rather, he said, the Compact "does not address the question of which State has sovereignty over *an expanded Ellis Island*" (R 62). The Special Master found the reasoning of the Second Circuit in *Collins* "unpersuasive" (R 81), rejected New York's suggestion that "the Compact accommodates th[e] possibility" of "territorial expansion of a small island" (R 92), and deemed "ambiguous" the evidence "that the practice of fill or wharfing-out had been established and thus taken for granted" at the time of the Compact (R 92 n 39).

Because the Special Master believed that "the Compact does not address expansion by landfill" (R 92), he turned to the common law of "avulsion," or sudden shifts and changes of land. Finding "that acts of avulsion do not expand territorial lines," the Special Master concluded that the avulsive change made by landfill to Ellis Island could not alter the boundary between the states, such that the filled portions of Ellis Island remained "within the sovereign territory of New Jersey" (R 97-99).

The Special Master then addressed the issue of prescription and acquiescence. He recited New York's acts of prescription, noting that "New Jersey does not contest" them (R 113). Believing, however, that "[t]he evidence of many of these acts is inconclusive with respect to the landfilled portion of the Island" (R 114), he found that New York "failed to prove that she exercised dominion and possession over the landfilled area of [Ellis] Island" (R 124), adding that, in any event, "New Jersey's evidence of non-acquiescence . . . is conclusive" (R 124).

The Special Master likewise rejected New York's contention that New Jersey was guilty of laches in asserting its claim to Ellis Island. In his

view, New York had not demonstrated prejudice to itself by New Jersey's delay in filing suit (R 103-105). The Special Master noted New York's position "that documents may have been destroyed prior to the time suit was commenced," but found it "impossible to know from the record whether that speculation is correct" (R 104-105). Thus, he could not "find prejudice on the facts before" him (R 105). In any event, he opined, "application of the laches doctrine is not necessary to a just resolution of this case" because "New York's concerns can be addressed through an analysis of prescription and acquiescence" (R 105).

Finally, having concluded that all of the landfilled portion of Ellis Island was subject to New Jersey's jurisdiction, the Special Master attempted to draw the sovereign boundary between the two states on Ellis Island. He recommended that New York be given the "original Island" to its mean low-water rather than its mean high-water mark (R 151-154) and ordered the parties "to appoint a surveyor to define in precise terms the boundary I have described" (R 155-162, 168). On May 30, 1997, the Special Master issued a Supplement to his Final Report. He chose as his "Designated Survey" a survey prepared by New Jersey with certain slight variations (S 11). This survey leaves New York with a territory of 5.1 acres, while New Jersey gets the remaining territory (S 8). On June 16, 1997, this Court issued an order accepting the Special Master's Report. 65 U.S.L.W. 3825.

SUMMARY OF ARGUMENT

New York's retention of its "present jurisdiction" over Ellis Island in the 1834 Compact with New Jersey entitles it to sovereignty over both the landfilled and "original" portions of the Island. The plain language of the Compact awards "Ellis Island" to New York with no limitation on the size of the Island. The use of landfill to reclaim subaqueous territory in New York Harbor was so commonplace at the time of the Compact that it required no specific mention in Article Second of the Compact to have been envisioned by the Compact's framers. Moreover, New York's retention of sovereignty over the islands in New York Harbor was critical to a central aim in creating the Compact: maintaining New York's control over commerce and navigation in the Harbor.

Even without the Compact, New York's long and continuous possession of Ellis Island and New Jersey's acquiescence therein entitle New

York to sovereignty over the entire Island under the doctrine of prescription and acquiescence. Throughout the "immigration period" of 1890-1954, and on both the filled and "original" portions of the Island, New York acted in the areas of voting, health, vital records, marriage, law enforcement and labor standards. New Jersey never did. All branches of the federal government regarded Ellis Island as in New York. There is no evidence that anyone who lived on, worked at or passed through Ellis Island during the immigration period believed that the Island was in New Jersey. The few episodes mentioned by New Jersey as evidence of its "counter-prescription" over the Island instead demonstrate, in their sparseness, brevity, and obscurity, that New Jersey acquiesced in New York's exercise of dominion.

The doctrine of laches also entitles New York to prevail. The policy considerations that prevent application of this doctrine to a sovereign do not pertain to interstate compact cases. Nor are the concerns vindicated by laches adequately addressed by the doctrine of prescription and acquiescence. Indeed, in an early interstate compact case, this Court recognized the applicability of both doctrines. In the present case, New Jersey's unexplained decades-long delay in commencing suit has deprived New York of probative documents and testimony addressing both its exercise of dominion over the Island and New Jersey's acquiescence in that exercise, and thus has prejudiced New York's case.

ARGUMENT

POINT I

UNDER ARTICLE SECOND OF THE COMPACT, NEW YORK HAS JURISDICTION OVER THE FILLED PORTION OF ELLIS ISLAND

The plain language of Article Second of the 1834 Compact indicates that Ellis Island, in its entirety, is under New York's jurisdiction. The "present jurisdiction" retained by New York over "Ellis Island" is sufficient to guarantee New York's sovereignty over both the "original" and filled portions of the Island as it exists today. This interpretation is supported by the widespread use of landfill to reclaim subaqueous land in New York Harbor at the time of the Compact and comports with a central purpose of the Compact, which was to resolve rights of property and jurisdiction while maintaining New York's control over commerce and navigation in New York Harbor.

The central question under the Compact is this: Why, given that (by New Jersey's own admission, *see* 1993 Complaint p 15) the Compact's award of "jurisdiction" over Ellis Island is sufficient to put whatever portion of Ellis Island is encompassed by Article Second "within the territory and jurisdiction of the State of New York,"⁴ and that (as the Special Master recognized) the Compact itself contains no express geographical limitation on the "Ellis Island" that is under New York's control, should New York not be entitled to all of Ellis Island as it currently exists? The Second Circuit could find no reason. "Surely," that court said, "the Commissioners must have contemplated that the territory of the Island might over the years decrease or increase as the result of natural or artificial forces;" indeed, the "language of size forms no part of the structure of the Compact as it

⁴The Special Master appears uncertain whether even the "original" Ellis Island is "in" New York, or whether New York instead has only "some degree of extra-territorial law-making and law-enforcing authority over the 1833 islands in New Jersey's territorial waters" (R60). New Jersey's concession that at least part of Ellis Island is in New York's "territory" resolves the question: whatever portion of Ellis Island is under New York's sovereignty is also "in" New York.

specifically relates to Ellis Island." *Collins*, 956 F.2d at 386-87. The simple facts are that the Compact "does provide for jurisdiction over Ellis Island," that it says nothing suggesting that New Jersey might have jurisdiction, and that instead "New York is the jurisdiction provided." *Id.* at 389.

The Special Master rejected this straightforward reading of the Compact, instead concluding that it "does not address the question of which State has sovereignty over an expanded Ellis Island" and for that reason resorting to the common law of avulsion (R 62). None of the reasons offered by the Special Master for rejecting this interpretation is persuasive.

The sole paragraph on this subject in the body of the Special Master's Report offers an improbable reading of Article Second and then rejects New York's interpretation by attributing the absurdity to New York. In the Special Master's view,

New York's position raises the question of what the States would have contemplated in 1833 if Ellis Island were to grow to many times its "original" size. . . . Would no limits have been contemplated on the ultimate size of the Island over which New York had jurisdiction? . . . Under this interpretation of the Compact, . . . New York theoretically could add to her territory an area as large as Governors Island within New Jersey's sovereign territory. I am unpersuaded the Compact accommodates this possibility. If such territorial expansion of a small island were contemplated in 1833, some references to it would logically have been set forth in the 1834 Compact. Silence cannot bear such interpretative weight (R 92).

As this Court has noted, however, a statute (such as the 1834 Compact) is not to be interpreted "by envisioning extreme possible applications." *United States v. Sullivan*, 332 U.S. 689, 694 (1948). Obviously, far-fetched results can be imagined for the Special Master's reading of the Compact as well: for instance, it would appear to permit New Jersey to surround Ellis Island with landfill and thwart whatever uses New York might make of the Island. Compact interpretation, however, is not a matter of dueling absurdities. Although "Congressional consent elevates an interstate compact into a law of the United States, yet it remains a contract which is subject to normal rules of enforcement and construction."

Oklahoma v. New Mexico, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., concurring in part and dissenting in part). As a matter of federal common law, and in both New Jersey and New York, every contract contains an implied covenant of good faith and fair dealing between the parties. See *Kentucky v. Indiana*, 281 U.S. 700, 701 (1930) (decree of this Court requiring that Indiana perform in good faith the covenants of interstate agreement); *Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575, 587 (NJ 1997); *New York Univ. v. Continental Ins. Co.*, 662 N.E.2d 763, 769 (NY 1995). The suggestion that a literal reading of the Compact, unaided by either this implied covenant or common sense, would permit Ellis Island to become the land mass that swallowed New Jersey, does not address, let alone resolve, whether the "Ellis Island" referred to in Article Second encompasses the modest landfill added to the Island during the immigration period of 1890 through 1954.

The fact that extension of Ellis Island by landfill could have been foreseen by the Commissioners who devised the Compact is demonstrated by the widespread use of landfill to reclaim subaqueous land in New York Bay by both New York and New Jersey before and at the time of the Compact. The Special Master found evidence of this practice "too ambiguous to permit a factual finding that the practice of fill or wharfing-out had been established and thus taken for granted during that time" (R 92 n 39). In fact, the evidence is conclusive on this point.

Indeed, as the Special Master recognized, prior to 1833, Ellis Island itself had been expanded by means of landfill. An 1819 map shows a pier or dock on the southwest side of the Island (NJ 478 [G]). New York's expert testified that this pier was probably constructed to carry ammunition by rail to Fort Gibson, and thus needed to be sturdy, and that the pile-driving techniques necessary to enable pilings to support such weight were not in use at the time (T 2932, 3029). The Special Master professed himself "convinced by th[is] testimony" and concluded that "fill was added to Ellis Island before 1833" (R 158-159).

Moreover, as one expert put it, the history of New York City is a history of expansion by landfill (T 1617). The 1686 Dongan Charter granted to New York City the right to "fill and make up and lay out . . . the lands and grounds in and about the said City" to the low water mark (NY 743 pp 265-266). Between 1687 and 1695, the City of New York sold "water lots" of subaqueous land to private purchasers, who were required to construct a

street or wharf on the rear of their lots. J.W. Gerard, *A Treatise on the Title of the Corporation and Others to the Streets, Wharves, Piers, Parks, Ferries and Other Lands and Franchises in the City of New York* (1873) 208. Similarly, the Montgomerie Charter of 1730 gave City officials "the land beneath the Hudson River to four hundred feet from low water mark . . . with full power and authority . . . to fill make up wharf and lay out . . . [and] build upon and make use of in such manner as they . . . shall think fit" (NY 743 pp 324-325). Periodically thereafter during the 1700s and early 1800s, New York City received authority to fill more subaqueous land. Report of Harbor Commissioners Relative to Encroachments and Preservation of the Harbor of New York, 1856 Documents of the Assembly of the State of New York, Doc. No. 8, pp 30-35. "The New York City seaport . . . was complete by 1835," and "[a]ll of it was built on landfill, the earth excavated from unwanted hills as the city leveled and regulated itself in the 1810s" (NY 916). By the 1830s, the original shores of Manhattan "were two or three blocks inland," while the outermost streets on the East and Hudson Rivers "were on 'made land,' far out beyond the low-water mark of earlier days." Robert G. Albion, *The Rise of New York Port* 221 (1939). By 1834, there were at least 750 acres of "made land" in Manhattan. Ann L. Buttenweiser, *Manhattan Water-Bound* 28-29 (1987).

Nor was the use of landfill confined to New York. In 1805, the owner of a tract of subaqueous land in New Jersey filed in the Bergen County Clerk's office a map of this land, including public streets, entitled "a plan of the new city of Hoboken." *City of Hoboken v. Pennsylvania R. Co.*, 124 U.S. 656, 659 (1888). For many years afterward, this land remained underwater. *Id.* at 660. But the fact that in 1805 a New Jersey landowner troubled to devise a street map for subaqueous land indicates the routine expectation that New Jersey tideland, like the land around Manhattan, could and would be reclaimed by landfill. Similarly, a case of New Jersey's highest court establishes that the Jersey Associates, proprietors of subaqueous land in Jersey City, had been "engaged, since 1804, in reclaiming the [Jersey] flats," such that by 1852 "nearly one half of all Jersey City [was] below the old high water mark." *Bell v. Gough*, 23 N.J.L. 624, 652 (N.J. 1852).

Thus, the evidence indicating that the "use of fill on islands in [New York] harbor and on the Manhattan or Jersey shores was already an accepted practice" is not, as the Special Master concluded, "ambiguous" (R 92 n 39); rather, it is overwhelming. Both New York and New Jersey

recognized and practiced the use of landfill as a means of reclaiming subaqueous territory. And the routine use of landfill for this purpose means that its employment for a modest expansion of Ellis Island would indeed have been taken for granted in 1833.

According to the Special Master, even a finding "that the practice of fill . . . had been established and thus taken for granted" by 1833 would not have "affect[ed his] analysis" (R 92 n 39). There are, he says, three reasons for this: "the scheme of the Compact, the absence of any allusions to such practices in the Compact, and this Court's application of the doctrines of accretion and avulsion in original jurisdiction cases" (R 92 n 39). None of these objections withstands scrutiny.

By "the scheme of the Compact," the Special Master evidently means that "the 'grand scheme' of the Compact was to declare territorial rights to the Bay of New York and most of the Hudson River, . . . not to speculate on the growth potential of the small islands in the Harbor" (R 93). But though the drafters of the Compact were of course concerned with more than just Ellis Island, the disposition of the Island in the Compact was part of one of the Commissioners' central aims: retention of New York's control over commerce and navigation in New York Harbor. During the unsuccessful 1827 negotiations between the states, New Jersey proposed to "yiel[d] to New York exclusive jurisdiction over the adjoining waters in several important matters, which the health and commercial welfare of the city of New-York seemed to require," deeming "these concessions to be justified" because "that great and rapidly increasing emporium of commerce is identified with our national prosperity" (NJ 274). Thus, said New Jersey, it offered New York "important rights in the waters of the Hudson, so as to ensure to the city of New-York the more effectual protection of her health and commerce" (NJ 276).

This was the context in which the Compact was eventually produced in 1833. It awarded New York "exclusive jurisdiction of and over all the waters of the bay of New York." The New York Commissioners who negotiated the Compact made clear the significance of this grant: "[T]he middle of the waters" between the states, they said,

is to be the line of jurisdiction, except where circumstances render a departure from it proper. This was peculiarly the case with respect to the waters adjacent to the City of New

York, and we trust that the jurisdiction necessary for the health, improvement, and police of that City has been amply secured (NJ 312).

Decisions of this Court and the highest courts of both states support the view that guaranteeing New York's control over commerce and navigation in New York Harbor was, along with establishing the territorial boundary between the states, the great object of the Compact. *See, e.g., Central R.R. Co. of New Jersey v. Mayor of Jersey City*, 209 U.S. 473, 479 (1908) ("the purpose [of Article Third grant of exclusive jurisdiction] was to promote the interests of commerce and navigation"); *Ferguson v. Ross*, 27 N.E. 954 (N.Y. 1891) (purpose of Article Third "was to promote the interests of commerce and navigation, which would, as supposed, be best subserved by giving to [New York] the exclusive control and regulation of the waters of the bay and harbor"); *State v. Babcock*, 30 N.J.L. 29, 31 (N.J. 1862) (Elmer, J., one of New Jersey's 1833 Commissioners) (New York "deemed it indispensable that their great commercial emporium should have the exclusive control of the police on the surrounding waters").

Without exception, New York's "indispensable" jurisdiction extended under the Compact to both the waters and the land -- that is, the islands -- in New York Bay.⁵ In this manner, consistent regulation of the Harbor -- from its military and commercial traffic to its ferried passengers to its lighthouses and ship markings -- was assured. Although the framers of the Compact could have achieved this purpose by other means, they chose to do so by awarding New York sovereignty over the islands in the Harbor. As the Special Master sees it, however, the instant any landfill is added to any of the islands west of the mid-point of the Bay, New Jersey's entitlement to sovereignty over such newly-made land undermines New York's authority in the middle of the very waters over which New York's exclusive

⁵ Article Second of the Compact awarded New York, in addition to Bedloe's and Ellis Islands, "exclusive jurisdiction of and over the other islands lying in the [Bay] and now under the jurisdiction" of New York. The Compact contains no parallel provision for New Jersey, which in its 1829 Complaint in this Court conceded that New York had jurisdiction over "Staten Island [the largest island between the states in the Bay] and the other small islands in the dividing waters between the two States" (NJ 293)--in other words, over all the islands in the Bay.

jurisdiction is essential. This reading of the Compact is simply incompatible with a central aspect of the Compact's "grand scheme," which was to preserve New York's jurisdiction over New York Bay. If, as the Special Master concludes, New Jersey was sovereign over everything west of the mid-point of the Bay but a few islands, the purpose of New York's retention of sovereignty over those islands must have been to further its control over navigation and commerce. The states cannot have intended to frustrate this aim by dividing jurisdiction immediately upon the (perfectly foreseeable) addition of landfill to these islands.

This in turn clarifies the significance of "the absence of any allusions" to landfill in Article Second. As between the two states, New York was awarded entire sovereignty over the islands in New York Bay. In view of the completeness and the purpose of this grant to New York, it is improbable that the Commissioners meant such sovereignty to be undone in the likely event that landfill was added to any of these islands. The Compact's silence on the subject thus requires an inference exactly the opposite of the Special Master's: Not that Article Second would have contained a reference to landfill if "such territorial expansion [had been] contemplated" (R 92), but rather that, in the absence of any limiting language in the Compact, the foreseeable use of landfill could not compromise New York's sovereign rights.

There is, finally, no avoiding this interpretation through resort to "this Court's application of the doctrines of accretion and avulsion in original jurisdiction cases." As the Court has indicated, these common-law doctrines apply only when an interstate compact does not address the issues they might otherwise be invoked to resolve. See *Shapleigh v. Mier*, 299 U.S. 468, 470 (1937) (despite "the ordinary rule [that] a change of location resulting from avulsion" cannot change sovereignty, "[h]ere a different rule applied by force of a convention" between Mexico and the United States). In other words, a disposition of land by treaty, convention or compact has the effect of displacing the otherwise-applicable common law. And that is what has occurred in this case. By 1834 the practice of adding territory through the use of landfill was so widely undertaken and accepted that it required no mention in the Compact to have been contemplated by the framers. As the Second Circuit recognized in *Collins*, the Compact envisioned that New York, as a dimension of its control over navigation and commerce in New York Bay, would be sovereign over an expanded (or indeed diminished) "Ellis Island." The Special Master erred in finding otherwise.

Nor is this outcome altered by acceptance of the Special Master's conclusion that "Ellis Island" consisted of "three islands for at least a brief period in time" (R 95). As discussed below, this conclusion is itself erroneous. But in any event, there is no question that New York's assertion of sovereignty derives from its retention of jurisdiction over "Ellis Island" in Article Second of the Compact. New York's undisputed actual possession of the original Ellis Island pursuant to the Compact, coupled with New Jersey's failure ever to possess or assert any sovereignty over the filled portions of the Island, means that New York -- quite aside from its actual exercise of sovereignty over the filled portions of the Island -- may lay claim to the entirety of Ellis Island.

Thus, for example, in *Michigan v. Wisconsin*, 270 U.S. 295 (1926), Wisconsin had "for a period of more than half a century" exercised "undisputed and undisturbed possession of substantially all of the islands in" a particular section of the Menominee River between Michigan and Wisconsin. *Id.* at 310. Michigan nonetheless asserted a claim to the remaining islands, which "ha[d] never been surveyed or any definite acts of dominion exercised over them by either state." *Id.* at 313. Wisconsin's "assertion and exercise of dominion" over the islands it *had* occupied was undertaken "in virtue of, and in reliance upon . . . the Wisconsin Enabling Act." *Id.*

This was enough to entitle Wisconsin to the remaining islands. As the Court noted, "actual possession of a part of a tract by one who claims the larger tract, under color of title describing it, extends his possession to the entire tract in the absence of actual adverse possession of some part of it by another." *Id.* Thus, because the Wisconsin Enabling Act "gave color of title in that state to all of the islands within the limits there described," Wisconsin's

continued possession, assertion, and exercise of dominion and jurisdiction over a part of these islands . . . extended [its] possession, dominion, and jurisdiction to all of them, in the absence of actual possession of, or exercise of dominion over, any territory within the boundary by Michigan. *The fact that the islands constitute separate tracts of land is of no consequence here, whatever its effect might be under other conditions. In applying the rule, the area within the described boundary, both land and water,*

must be considered as together constituting a single tract of territory. Id. at 313-314 (emphasis supplied).

The same analysis applies to Ellis Island. The Compact reserves "Ellis Island" to New York, untrammelled by any rights to the Island awarded to New Jersey and subject only to such jurisdiction as New York had ceded to the United States in 1800. Even if the landfill additions to Ellis Island, at some "synaptic moment in time," took the form of separate "islands" (R 96), that fact is of no consequence. The Compact gave New York "color of title" and jurisdiction over everything that was Ellis Island, and everything constituting that Island is "a single tract of territory." As discussed *infra* Point II, New Jersey undertook no "actual possession of, or exercise of dominion over," any portion of Ellis Island. Accordingly, whether "Ellis Island" was one island, two, or three, it was and is New York's.

The fact remains, however, that Ellis Island was a single island. This is most obviously the case with respect to "Island No. 2." Before construction of this extension, the westernmost point of Ellis Island was a 1200-foot breakwater that formed the western side of the "ferry slip" (NY 932 pp 38, 40; T 2966-2967). This protected landing for ferries formed a "U," of which the breakwater was the western side and a bulkhead enclosing recently-added landfill was the eastern side (NY 952, pp 29-31; NY 932, p 40). The architectural plans for the "hospital extension" depict a ferry house built on artificial fill and connecting the older and newer landfill (T 2038-2041; NY 952 p 36). The bulkheads for the new and old landfill and the connection between them had been constructed at the same time and of identical material: timber "cribs" loaded with rocks, sunk to the bottom of the Bay and filled with ash to make them impermeable to water (T 2963-2965, 2975; NY 932 pp 38-44). The breakwater became the eastern portion of the bulkhead holding in the new landfill, while the cribbing at the northern end of the ferry slip supported the ferry house, which was built on pilings embedded in the cribbing (T 2972, 2985). The ferry house itself and the waiting rooms on either side of it served as the above-water connection between the old and new portions of landfill (NY 952 p 577; NY 74 p 1213).

No one affiliated with Ellis Island immediately after the three-acre hospital extension was completed and the hospital upon it opened in 1902 regarded that extension as anything but a part of Ellis Island. When discussions began in 1902 about the use of further landfill on which to build

the contagious disease hospital, the Supervising Engineer spoke of Island No. 2 as a "three acre addition to Ellis Island" (NY 952 p 505). Similarly, in 1905, the Commissioner of the Ellis Island Immigration Station referred to "that portion of Ellis Island known as the Hospital Island" (NY 638). That same year, the Commissioner General of Immigration envisioned the contagious disease hospital as requiring "construction of an artificial island adjoining Ellis Island" (NJ 369). And even New Jersey, in identifying the 1899 landfill on the map it prepared for its 1904 conveyance of subaqueous land to the federal government, *see infra* pp. 30-31, called it the "hospital extension" (NJ 7).

The sole suggestion in the record before the Special Master that the hospital extension was a separate island is a June 1901 photograph of the ferry house showing water flowing between its supporting piles (R App E). On the basis of this photograph, the Special Master concluded "that Island Number Two was surrounded by water at one time" (R 96). As explained at trial, however, the timber cribbing in which the supporting piles were embedded was itself built up to the high water line at the ferry house (T 2965-2974). Because June is a month when the tides in New York Bay are high, the water in the photograph obscures the solid cribbing supporting the piles (T 3315-3316). Despite the fact that under some circumstances water flowed the full length of the western and eastern sides of the ferry slip between the old and new landfill, the hospital extension known as "Island No. 2" remained a part of Ellis Island, connected to the earlier landfill by the ferry house itself and the cribbing on which it was built.

As to the landfill added in 1905-1906 for the contagious disease hospital: After the crib bulkheads were emplaced for containment of this landfill, it was connected to the existing hospital extension by a plank-faced, pile-supported "gangway" between the newer and older portions of fill (NJ 368; NY 662; T 3065, 3110). During World War I, the United States Army replaced this open gangway with a covered way (NY 952 p 468); the first sections of additional landfill between the two extensions were added in the early 1920's (NY 952 p 7). At no point were the two areas of fill ever unconnected.

Ultimately, however, as discussed above, the Court need not determine whether "Ellis Island" was, at any point in its history, one island, two, or three. The 1834 Compact between New York and New Jersey awarded "Ellis Island," without limitation, to New York, at a time when

reclamation, by means of landfill, of subaqueous lands adjacent to fast lands was so common in and around New York Harbor as to be taken for granted and require no special mention in Article Second. This retention of sovereignty furthered one of the central purposes of the Compact: To allow New York to continue to exercise authority over commerce and navigation in New York Harbor. Moreover, New York's assertion of sovereignty over "Ellis Island" pursuant to the Compact, and its presence on the Island unopposed by any actual possession of any part of the Island by New Jersey, entitles it to all of the Island. However it is regarded, the "Ellis Island" envisioned by the Compact and awarded to New York embraces all of Ellis Island as it exists today.

POINT II

NEW YORK HAS OBTAINED SOVEREIGNTY OVER ELLIS ISLAND THROUGH ITS EXERCISE OF DOMINION OVER THE ISLAND AND NEW JERSEY'S ACQUIESCENCE IN THAT EXERCISE

Even without the Compact, New York is entitled to include within its sovereign territory the entirety of Ellis Island as it is today. As this Court has noted, "[t]here is a 'general principle of public law' that, as between States, a 'long acquiescence in the possession of territory under a claim of right and in the exercise of dominion and sovereignty over it, is conclusive of the rightful authority.'" *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991) (cit om). This doctrine of "prescription and acquiescence" requires that the state asserting it show by a preponderance of the evidence both its own "long and continuous possession of, and assertion of sovereignty over, the territory" in question and the opposing state's "long acquiescence in those acts of possession and jurisdiction." *Id.* Because New York has sufficiently demonstrated both its prescriptive acts over Ellis Island and New Jersey's acquiescence therein, it is sovereign over Ellis Island regardless of how the Compact is interpreted.

The Court has recognized that prescription and acquiescence is analogous to the operation of adverse possession: " '[T]he uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as . . . a similar possession by an individual excludes the claim of every other person to the article of property in question.' " *Virginia v. Tennessee*, 148 U.S. 503, 524

(1893) (cit om). And just as a claim of title, once extinguished by adverse possession for a given period, cannot be revived, *see, e.g., Sharon v. Tucker*, 144 U.S. 533, 543-544 (1892), so a sufficient exercise of dominion for a sufficient period of time by a state extinguishes permanently a claim of sovereignty by another state. Thus, for example, in *Georgia v. South Carolina*, 497 U.S. 376 (1990), an original jurisdiction case brought in 1977, South Carolina conceded that Georgia had undertaken acts of dominion and control over certain disputed territory as early as the 1950s. Nonetheless, South Carolina's prior exercise of dominion over the territory and Georgia's acquiescence in that exercise meant the territory belonged to South Carolina. *Id.* at 391-392; *see also Michigan v. Wisconsin*, 270 U.S. at 306-307 (Michigan's attempt to exercise dominion fifteen years before filing suit but after sixty years of acquiescence in Wisconsin's sovereignty was ineffective).

New York's entitlement to all of Ellis Island as it existed before 1890 is conceded by New Jersey. In 1955, after Ellis Island was declared surplus federal property, New Jersey state and local officials, although uncertain as to their state's authority over the Island, began offering public comments about the uses to which the Island might be put (NJ 96, 97, 99, 402). But by then it was too late. During the entire "immigration period" in the interim, from 1890 to 1954, New York possessed and exercised dominion over Ellis Island, while New Jersey acquiesced in that exercise. This "long acquiescence" by New Jersey in New York's possession of and dominion over Ellis Island is sufficient, quite apart from the 1834 Compact, to entitle New York to include the Island within its sovereign territory today.

A. New York Engaged In Sufficient Acts of Dominion Over the Filled Portions of Ellis Island to Give Rise to Prescriptive Rights to the Island

Before, throughout and after the immigration period New York acted in the areas of voting, health, vital records, labor, law enforcement and marriage on Ellis Island. These powers were exercised on both the filled and unfilled portions of the Island. Throughout this period, the federal government almost universally regarded Ellis Island as in New York, without regard to whether the filled or unfilled portion of the Island was in question. The evidence on this matter is not, as the Special Master believed, "scant," "isolated" or "episodic" (R 118). It is overwhelming.

It is first of all of little consequence to New York's argument that the United States exercised a measure of jurisdiction over Ellis Island pursuant to New York's grant of jurisdiction in 1800 and deed in 1808. As the Special Master recognized (R 110), a state may demonstrate prescriptive acts even over disputed territory occupied by the United States. *See, e.g., Arkansas v. Tennessee*, 310 U.S. 563, 571 (1940) (Tennessee acquired by prescription territory to which United States holds title). Obviously, New York's exercise of jurisdiction was not as extensive as it might have been had the United States not shared jurisdiction over Ellis Island. But such jurisdiction as there was to be exercised by a state was exercised exclusively by New York, and never by New Jersey.

Thus, for example, throughout (as well as before and after) the immigration period, Ellis Island -- without any distinction between its "original" and filled portions -- has been placed in New York County and New York City by state statute. *See* 1882 N.Y. Laws, ch. 410, § 1; 1897 N.Y. Laws, ch. 378; 1901 N.Y. Laws, ch. 466, § 1. The Island is and always has been a component of New York Congressional Districts, as well as its State Assembly Districts (NY 52-58, 457, 970; T 2394-2398) and State Senate Districts, *see, e.g.,* N.Y. Const. of 1894, art. III, § 3; N.Y. Const. of 1938, art. III, § 3.

Moreover, the residents of Ellis Island actually voted in New York -- a significant dimension of a state's exercise of prescription over disputed territory. *See, e.g., Arkansas v. Tennessee*, 310 U.S. at 567; *Michigan v. Wisconsin*, 270 U.S. at 317. The Island's residents, most of them affiliated with the Ellis Island hospitals, lived exclusively on the filled portions of the Island; there were never any residence facilities for staff on the "original" portion of the Island (T 2066, 2071; NY 74 pp 1224, 1253). Over a period of decades⁶, New York voter registration lists bear the names of people who variously list their residences on Ellis Island as "El Hospital" (NY 53), "#3 Island" or "#2 Island" (NY 54), "H [i.e., "hospital"]" (NY 55), "El Staff House" (NY 56), "Isl. #3" or "Isl. #2" (NY 953), "Marine Hospital" (NY 954, 956), or "2" or "3" (NY 955). The listings signify that these people lived on the filled portions of Ellis Island and voted in New York.

⁶New York presented voting records from 1917, 1918, 1919, 1925, 1926, 1930, 1936, 1939, 1945, and 1953 (NY 52-58, 953-956).

New York also was responsible for keeping records of the vital events that took place on Ellis Island. A series of 23 birth certificates indicates that the births of children on Ellis Island were recorded by New York. Seventeen of these certificates are dated before the 1897 fire (NY 24-40). Two additional certificates, from 1904 and 1908, identify the place of birth as, respectively, "Emmigrant Hosp. E.I." and "Ellis Island Hospital" -- that is, the hospital on Island No. 2 (NY 41, 44). Three other certificates from 1909, 1921 and 1922 identify the place of birth only as "Ellis Island, N.Y." (NY 23, 42, 149), but it seems reasonable to infer that the births occurred in the hospital at Ellis Island and therefore on filled land.

Death certificates on Ellis Island were likewise issued by New York. Twenty-two such certificates appear in the record (NY 1-22). All but one identify the "institution" in which the death occurred as "U.S. Marine Hospital #43 Ellis Island N.Y." (NY 2-22). In the Special Master's view, New York could not prove that the births and deaths it "documented occurred on the Island, let alone the landfilled portion" (R 114-115). But the births and deaths occurred at the Marine Hospital on Ellis Island, and the hospital was situated on landfill.⁷

Marriages on Ellis Island likewise occurred in New York, a relevant factor in determining sovereignty over disputed territory, *see Arkansas v. Tennessee*, 310 U.S. at 567. The record contains six New York marriage certificates, four from 1901 (NY 46-49) and two from 1914 (NY 45, 150), listing either the bride's or the groom's residence as Ellis Island. Indeed, when in 1907 the New York State Legislature passed a statute requiring that marriage licenses be obtained from the clerk of the town or city in which "the woman to be married resides" or "in which the marriage is to be performed," 1907 N.Y. Laws, ch. 742, § 8, the Commissioner of Immigration at Ellis Island, noting that "a number of marriages are consummated at Ellis Island," sought advice "as to whether it will be necessary for this provision of the New York State laws to be complied with" (NY 657). The Commissioner-General of Immigration responded that

⁷The Special Master was troubled by "[t]he few birth certificates" submitted by New York and the fact that "[t]he death certificates are almost all from one year" (R 114). The prejudice caused New York in accumulating such evidence by New Jersey's long delay in commencing this action is discussed at Point III, *infra*.

it would, for "there is no Federal statute on the subject of marriage [,] and therefore it seems only reasonable and proper that the laws of the particular jurisdiction shall be complied with" (NY 657).

The Special Master nonetheless believed that "[t]here is no conclusive evidence that the marriages represented by the marriage certificates took place on the Island" (R 114-115). Although the 1914 marriages may have taken place on Manhattan Island, all evidence indicates that the 1901 marriages -- and hundreds more like them -- actually occurred on Ellis Island. The Special Master complained that the memoirs of Fiorello LaGuardia, the former mayor of New York City who worked as an interpreter at Ellis Island between 1907 and 1910, "describe having travelled to Manhattan with couples so they could get married, but d[o] not include recollections of marriages having occurred on the Island" (R 114-115). Other record evidence, however, contains such recollections. The memoirs of Edward Corsi, Commissioner of Immigration at Ellis Island between 1931 and 1934, include an interview with Frank Martocci, a former interpreter at the Island, on the subject of "What It Was Like to Work on Ellis Island in 1907" (NY 74 pp 401-415). According to Martocci, "[v]ery often brides came over to marry here, and of course we had to act as witnesses. I have no count, but I'm sure I must have helped at hundreds and hundreds of weddings of all nationalities and all types. The weddings were numberless, until they dropped the policy of marrying them at the Island and brought them to City Hall in New York" (NY 74 p 409).

Both the federal and New York State census bureaus regarded Ellis Island as part of New York, and treated its residents -- all of whom, as noted above, lived on the filled portions of Ellis Island -- as New Yorkers. See *Michigan v. Wisconsin*, 270 U.S. at 316 (where population is enumerated by census is pertinent to prescription and acquiescence). The record before the Special Master included information from the United States censuses for 1900, 1910, 1920, 1940, 1960, and 1970, and the New York State censuses for 1915 and 1925 (NY 59-62, 67-69, 912).

New York provided police and fire-protection services to Ellis Island. The Special Master acknowledged but made nothing of this fact, which obviously has bearing upon state sovereignty. See, e.g., *Georgia v. South Carolina*, 497 U.S. at 392-93. Edward Corsi noted that, in the 1897 fire, "New York rushed twenty policemen to keep order among the panic-stricken immigrants." Edward Corsi, *In the Shadow of Liberty* 114 (1935).

In 1934, when there was a fatality in a construction accident on the filled portion of Ellis Island, it was the New York police who responded and investigated (NY 293-297). Similarly, when in 1916 the seawall cribbing of Ellis Island caught fire after a nearby explosion, the New York City fire department and fireboats from New York City extinguished the fire (NY 933 p 20; T 2408). Indeed, when, in 1991 and 1992, New York City sought to curtail its fire-protection activities in New York Harbor, the Port Authority demurred, insisting that, since the 1834 Compact, "[t]he City of New York has historically provided fireboat protection for the waterfront areas of New York Harbor, including both sides of the Hudson River" (NY 917, 918).

The Special Master also overlooked the extensive application of New York State and New York City standards to labor performed on Ellis Island during the immigration period. Contracts from 1905, 1932, 1934 and 1945 called for work on the landfilled portion of the Island to be completed in accordance with formal New York City performance requirements (NY 608, 638, 794, 795). When immigration officials sought to establish wage rates and construction costs on the Island, they referred to prevailing rates in New York City. Thus, documents in the record from 1906, 1909 and 1910 show Ellis Island officials consulting the prevailing wages and prices in New York City to ascertain the rate to be paid for construction on the landfilled portion of the Island (NY 627-628, 636, 647). Similarly, New York City salaries were invariably used in documents from 1903 through 1925 as the benchmarks to determine what federal employees on Ellis Island, including the landfilled portion, should be paid (NY 661, 759, 355-56, 321, 323, 636).

This state of affairs did not change with enactment of the Davis-Bacon Act, 46 Stat. 1494 (1931), which provided that workers on "any public buildings of the United States" be paid at a rate "not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or civil division of the State in which the public buildings are located." Depression-era contracts for construction on Ellis Island, including the landfilled portion, routinely contained a term requiring that contractors pay their employees the "prevailing rate of wages of the City of New York" (NY 789, 794, 607-608, 799, 810, 811, 792, 814, 793). Similarly, both before and after the enactment of the Buck Act, 49 Stat. 1938 (1936), authorizing application to all United States property "which is within the exterior boundaries of any State" of that state's workmen's compensation law, New York workmen's compensation law was applied to claims arising from

work on the filled portions of Ellis Island (NY 283, 284, 306, 363, 795, 802).

The Special Master rejected this evidence in a single sentence. He noted that an INS historian who testified on behalf of New Jersey indicated that the United States "was not bound to" rely on New York State standards in federal construction projects (R 117). While this may be technically correct, the Special Master misses the point. Where actual state jurisdiction was in question on Ellis Island, such jurisdiction as could be exercised by a state was always exercised by New York, never by New Jersey. Other aspects of the relationship between New York and Ellis Island, such as the exclusive use of New York standards as a benchmark in construction and labor matters on both the filled and unfilled sections of the Island, demonstrate that those who oversaw and dealt with federal affairs on Ellis Island regarded New York as the state of which the Island was a part.

There is no question that all three branches of the federal government believed that Ellis Island was in New York. See *Michigan v. Wisconsin*, 270 U.S. at 317 (views of United States government probative of state sovereignty). Over the course of the immigration period, the INS was part of four different federal agencies, but at all times it regarded Ellis Island as part of New York. Letters and other documents originating with INS throughout this period identify "Ellis Island" -- often including specific references to the filled portions thereof -- as in New York (in chronological order: NY 387, 381, 374, 552, 631, 637, 551, 613, 610, 630, 171, 174, 732, 619, 354, 755, 162, 349, 350, 348, 607, 774, 512, 262, 468, 511, 163, 736, 142, 155, 140, 737, 160, 159). As the INS Assistant Commissioner General put it in 1923, "the Bureau has always considered Ellis Island as a part of the State of New York" (NY 971).

Other federal agencies which did business on or with Ellis Island also believed it was in New York. The Department of Public Health, which operated the hospital on Island No. 2, considered it to lie in New York (NY 137-139, 469, 618, 645, 668, 734). The Navy Department, which occupied filled portions of the Island during and immediately after World War I, thought it was operating in New York (NY 671-725). So did the Procurement Division of the Public Works Branch of the Department of the Treasury, which oversaw the Depression-era construction projects on the filled and unfilled portions of the Island (NY 207, 254, 273, 280, 301, 358). The Department of Justice, representing the Procurement Division in a 1936

lawsuit concerning a contract for labor on Ellis Island landfill, believed that work had occurred at "Ellis Island, New York" (NY 510, 532-533). At least one President shared this view. In his 1910 message to Congress, President Taft referred to "Ellis Island in the City of New York" (NY 186). And when, in 1954, the federal government inventoried its real property holdings, it identified the entirety of Ellis Island as in "New Jersey, Geographically -- New York Jurisdictionally" (NY 972).

The federal judiciary likewise believed that jurisdiction over matters involving Ellis Island was in the federal courts seated in New York.⁸ Federal proceedings involving the detention and deportation of aliens at Ellis Island were prosecuted in the Southern District of New York (NY 196-204). Indeed, on one occasion the Court of Appeals for the Third Circuit dismissed an Ellis Island-related deportation matter for lack of "territorial jurisdiction." *United States ex rel. Belardi v. Day*, 50 F.2d 816, 817 (3d Cir. 1931). A 1939 suit arising from a contract performed on the filled portion of the Island was brought in the Southern District of New York (NY 507). The United States Attorneys in New York represented the INS in matters litigated in the federal courts (NY 187, 344, 642).

Congress, too, believed that Ellis Island was in New York. See *Virginia v. Tennessee*, 148 U.S. 503, 516 (1893) ("the legislation of Congress" is relevant to prescription). Its acts appropriating funds for both the filled and "original" parts of the Island referred to "Ellis Island, New York." See 35 Stat. 20 (1908); 32 Stat. 1084 (1903); 30 Stat. 113 (1897). When in 1917 the House Committee on Rules conducted hearings on a resolution involving Ellis Island, it regarded these hearings as "Concerning Conditions at Ellis Island Immigration Station, N.Y." (NY 74 p 1297). Indeed, at least one New Jersey Senator shared the view of his colleagues. In 1934, Senator Hamilton F. Kean wrote to the Procurement Division concerning certain new construction on landfill at Ellis Island. Senator Kean identified the location of this project as "Ellis Island, New York" (NY 292).

⁸The New York state courts also had jurisdiction over certain Ellis Island matters. See *Rettig v. John E. Moore Co.*, 154 N.Y.S. 124 (N.Y. App. Term 1915) (civil action for assault committed "upon government property at Ellis Island").

Finally, quite aside from official acts and documents, there is the question of where those who resided on Ellis Island -- that is, on the filled portions of the Island -- believed that they lived. Necessarily, there is less of this sort of evidence than any other. As discussed *infra* Point III, New Jersey's delay in bringing this suit has deprived New York of both the testimony and documents of most individuals who might shed light on the question. But there is nothing ambiguous about the evidence that remains. In 1905, a personnel form prepared by a woman working on Ellis Island as a "matron" listed her "P.O. Address" as "New York City -- Ellis Island" (NY 64). In 1908 and 1909, a total of four individuals who witnessed INS contracts listed their residences as "Ellis Island, New York" (NY 609, 615, 617, 625, 633). In 1920, an army nurse employed on Ellis Island who petitioned the United States of America for naturalization indicated that her residence was "Ellis Island, New York Harbor"; one of the witnesses to the petition gave her address as "Ellis Is., NY" (NY 63). A man who, as an infant in 1940-1941, lived with his family in staff quarters on the landfilled portion of Ellis Island, states that his family believed itself to have resided in New York (T 3145-46). And of course, throughout the immigration period, residents of Ellis Island went to the polls in New York State and New York City elections (NY 52-58).

In sharp contrast to the abundant evidence of New York's assertion of sovereignty over and possession of Ellis Island, New Jersey can put nothing in the other pan of the scale. The handful of incidents on which New Jersey relies for a demonstration of its "counter-prescription" are discussed in the next section. But there is, quite simply, no evidence that anyone who lived on, worked at, or passed through Ellis Island during the immigration period believed that the Island was in New Jersey.

The Special Master thus erred entirely in concluding that New York offered evidence only of "isolated or episodic prescriptive actions . . . without certainty that these acts occurred on the landfill," and therefore failed to "prove prescription over the landfill" (R 118). Evidence of New York's continuous exercise of authority over Ellis Island is abundant, especially in view of the prejudice caused New York in discovering witnesses and retrieving documents by New Jersey's delay in filing suit. It is clear, moreover, that this authority was exercised over the filled and "original" portions of the Island alike. Because New York has thus shown its long and continuous possession of and dominion over the entirety of Ellis

Island, it has demonstrated its prescriptive right to assert its sovereignty over the whole Island.

B. New Jersey Acquiesced in New York's Exercise of Sovereignty over Ellis Island

In 1955, after Ellis Island had been abandoned by the INS and declared surplus federal property, various New Jerseyites -- not unlike distant relatives who have neglected the deceased while he was alive but still hope to inherit his estate -- began suggesting ways to make use of the Island. During (and before) the entire immigration period, however, New Jersey acquiesced in New York's assertion of authority over Ellis Island. The handful of acts and incidents proffered by New Jersey and accepted by the Special Master as indications of its nonacquiescence is not sufficient, even in the aggregate, to defeat New York's exercise of prescription over Ellis Island.

The Special Master first discusses (R 124-126) the United States' 1904 acquisition, at the insistence of the New Jersey Board of Riparian Commissioners, of a deed to the subaqueous land around Ellis Island (NJ 7, 351), much of which had been filled by the time of the deed. What is noteworthy about this deed and the events leading up to it is their irrelevance to any exercise of dominion over Ellis Island itself. The Board of Riparian Commissioners was empowered by New Jersey statute only to lease, sell and otherwise deal with "the lands lying under the waters of the bay of New York and elsewhere in the state." 1891 N.J. Laws ch. 123. By its own account, this Board was "not charged with anything except the sale of land which happens to be under water" (NJ 332 p 10). Thus, in 1890, when it learned of the United States' reclamation of the subaqueous land around Ellis Island, it did not act directly, instead calling "the attention of the Governor . . . to such unlawful occupation" (NJ 383[a]).

Nothing came of this effort. It remained to the Riparian Board to obtain what it was authorized to get: compensation for subaqueous land that New Jersey owned. Thus, in 1901, it took steps "to establish the right of the State of New Jersey to the lands under water" (NJ 3). And in 1904 United States Attorney General William H. Moody concluded "that the ownership of the[se] lands . . . is in the State of New Jersey" and, in furtherance of federal-state comity, obtained a deed to the land "for the nominal consideration of \$1000" (NJ 4, 351).

The most notable aspect of this episode is the distinction it preserves between jurisdiction over Ellis Island and ownership of the subaqueous land surrounding it. The Riparian Board had authority only to "get as much" as it could for this land (NJ 332 p 8). Having done so, the Board's interest in the land, and New Jersey's interest in Ellis Island, was at an end, presumably because the Governor of New Jersey, the Riparian Board and the remainder of New Jersey State government understood that fast land added to Ellis Island became, under the 1834 Compact, part of New York.

The Special Master also discusses (R 118-122) an erroneous map created in 1890. The map displays "Pierhead and Bulkhead Lines for Ellis Island, New Jersey, New York Harbor [,] as recommended by the New York Harbor Line Board" (NJ 330 [1-8]). The Harbor Line Board was a federal organization created in response to fears of encroachment upon the nation's harbors and the navigability of its waters by reclamation of subaqueous land undertaken by riparian owners (NY 932 pp 20-22). It regulated, subject to the Secretary of War's approval, the "pierhead lines" (i.e., the furthest permissible extent of pile-supported structures) and "bulkhead lines" (i.e., the furthest permissible extent of solid fill) in American harbors (NY 932 p 20; T 2902).

The first appearance of the map in question, in June 1890, shows Ellis Island and its recommended pierhead and bulkhead lines as they existed prior to expansion of the Island (NJ 330[1]). As Ellis Island expanded, the recommended harbor lines changed accordingly. The same map, identical in all respects to the 1890 map except that the harbor lines were changed and different signatures of approval appear, was reused in 1896, 1897, 1901 and 1911 (NJ 330[2],[5],[6],[7],[8]).

In the Special Master's view, the chief "significance of these maps is that they [i.e. the 1901 and 1911 maps] were approved by the Secretary of War, Elihu Root," a prominent New Yorker, "and produced over his signature" (R 119). The other Harbor Line Maps, the Special Master added, are significant because they "sugges[t] that New York's alleged acts of dominion and possession . . . over the landfilled portions of the Island, were not so conspicuous or continuous as to change the view of the Army concerning which State was sovereign" (R 120-121).

Everything the Special Master says about the Harbor Line Board maps is questionable. The most conspicuous aspect of the maps is, of

course, their erroneousess. As New Jersey concedes, "Ellis Island, New Jersey" is a misnomer. The "original" island, which is all that was depicted on the 1890 map, undisputedly belongs to New York. It is easy to understand how such an error occurred. The Harbor Line Board was a federal agency, and in its task of establishing harbor lines was indifferent to state boundaries. The 1890 mapmaker would not have been overly concerned with precise territorial boundaries.

The Special Master, while appearing to acknowledge this mapmaker's error, deemed it probative of "the United States' acceptance of New Jersey's legal position" that "the title on the map was reproduced subsequent to 1890" (R 120 n 45). But the repetition of the error is as easily explained as its cause. First, the 1890 map was not published. It was used simply to make recommendations to the Secretary of War which, if approved, would require no further action to become effective (T 2902-2903).

Moreover, changing this map was not a simple process. As New York indicated at trial, the maps were most likely produced from a single copper engraving, thus accounting for the identity among them of many signatures, the legend, the bathymetry, and other details, including the "Ellis Island, New Jersey" error (T 2910-2913). Only certain signatures of approval and the harbor lines themselves changed from map to map, suggesting that these features alone might have been added on paper copies of the map rather than the original engraving. It would have taken a skilled engraver to modify the original map (T 3090-3092). Given the difficulty of the process and the irrelevance of state boundaries to the task of establishing harbor lines, it is easy to see why no change was made, even if someone had noticed the error.

It is similarly easy to understand how Elihu Root -- who undoubtedly had more to concern him in 1901 than a mistaken designation, correctable only by a skilled artisan, on an intradepartmental document -- might have overlooked the map's error or deemed its correction not worth undertaking. And beyond the slightest question, the Special Master's conclusion that Root "actually signed these maps" (R 119 n 45) is wrong, for Root was Secretary of War only between 1899 and 1904, and his purported "signature" on the 1911 map, though dated 1901, unmistakably differs from the 1901 "Root" signature (N.J. 330[7], [8]).

Thus, the 1890 Harbor Line Board map, as reprinted through 1911, neither undermines New York's prescription over the filled portions of Ellis Island nor stands as an instance of New Jersey's nonacquiescence. The map's designation of "Ellis Island, New Jersey" was an error to begin with, and would not have been worth the trouble of changing even if someone had noticed it. And the chief significance the Special Master found in the map -- Elihu Root's signature upon it -- vanishes in view of Root's probable indifference to the error and the uncertain authenticity of the signature.

Other than the erroneous Harbor Line Board maps,⁹ New Jersey points to little between 1904 and 1933 that gives color to its claim of nonacquiescence. Puzzlingly, the Special Master relies on the Port Authority Amendment to the 1834 Compact. This 1921 agreement between New York and New Jersey provides that "[t]he territorial or boundary lines established by the [1834 Compact], or the jurisdiction of the two states established thereby, shall not be changed except as herein specifically modified." N.Y. Unconsol. Laws § 6421 (McKinney 1979). It says nothing whatever about Ellis Island. Similarly, the "voluminous" 1919 Report (NJ 408) of the Commissioners who devised the Amendment "does not discuss Ellis Island" (R 126).

To the Special Master, this silence was "a tacit recognition of federal hegemony over the Island" (R 128), and somehow "also serves as evidence of New Jersey's non-acquiescence," for "both States had the opportunity to discuss any and all issues of State activity in and around New York Harbor," and did not discuss Ellis Island (R 129). Both inferences are unwarranted. First, there is no showing that either state imagined (inaccurately) that an

⁹The Special Master did not mention a 1915 Harbor Line Board map showing "Pierhead and Bulkhead Lines for the Westerly Shore of the Upper Bay New York Harbor [,]3 Clifton, S.I. to Hudson River [,] including the Northeast Shore of Staten Island, N.Y. [,] Jersey Flats and Ellis Island, N.J." (NJ 384). The map reflects modifications of harbor lines elsewhere in New York Harbor; it does not purport to change the harbor lines for Ellis Island, which are said to "conform closely" to the lines established in 1890 and modified through 1911 (NJ 384). What is true of the Harbor Line Board maps actually establishing or changing harbor lines on Ellis Island is true *a fortiori* for this 1915 map: the misidentification of Ellis Island in this intradepartmental document might have gone unnoticed or, if noticed, been deemed insignificant or irrelevant in a map that had no bearing whatsoever on Ellis Island itself.

exercise of federal jurisdiction over territory within a state's boundaries rendered irrelevant the state's jurisdiction. Moreover, the likeliest conclusion to be drawn from the Commissioners' total silence as to Ellis Island is the one the Special Master rejects: "that the silence showed the views of one State with respect to her sovereignty were clearly accepted by the other" (R 128). Since, with the exception of the erroneous Harbor Line Board maps, every extant document between 1904 and 1933 suggests that all of Ellis Island is under the jurisdiction of New York, it is clear which views prevailed at the time of the Port Authority Amendment.

The Special Master briefly notes (R 123, 131) that -- apparently as early as 1924 -- Hudson County, New Jersey added both Ellis Island and Bedloe's Island to its tax rolls as exempt property, without distinguishing between the filled and unfilled portions of the Island (NJ 470-471). The motive and basis for this act remain obscure. It was in any event a well-kept secret, unknown not only to the United States and the State of New York but also, prior to 1992, to the State of New Jersey itself (NY 751-752). It can hardly stand as an instance of that state's nonacquiescence.

The Special Master relies heavily on several incidents in the 1930's to support New Jersey's supposed nonacquiescence in New York's exercise of sovereignty over Ellis Island. He mentions that, in 1933, Edward Corsi, the New Yorker who was then Commissioner of Immigration at Ellis Island, applied for a New Jersey waterfront development permit in connection with construction work on the seawall around Ellis Island (R 123, 134-135). What he fails to note is that the application itself, in identifying "Where work is contemplated," lists "New York" as the location (NJ 10). The application thus cannot be counted as an acknowledgment of New Jersey's sovereignty. Corsi may have regarded the subaqueous land surrounding Ellis Island, on which the construction was to occur, as part of New Jersey. He may have applied for the permit because the 1914 New Jersey statute empowering the Board that issued it requires that Board to investigate and report on "matter[s] incident to the movement of commerce upon all navigable rivers and waters within this State *or bounding thereon*," N.J.S.A. § 12:5-1 (West 1996) (emphasis supplied). But whatever his reason, "Ellis Island," in Corsi's view, including the filled portion, remained in New York.

Similarly, the Special Master mentions "a federal government application to New Jersey for a permit to construct a water main for Ellis Island in 1937" (R 123). The permit in question involved repairs to a water

main that stretched from Ellis Island to the shoreline of Jersey City (NY 471, 473-475, 477-488, 490-492). The United States was simply seeking a permit from New Jersey for work on New Jersey subaqueous lands. Indeed, letters and plans prepared by the United States Treasury Department in 1937 regarding easements obtained in connection with the water main repairs and submitted to New Jersey with the application depict the Ellis Island section of the water main as "Ellis Island, New York" (NY 474, 490-491).

The Special Master also mentions (R 135) a 1933 letter from federal Assistant Secretary of the Treasury L.W. Robert, Jr. to the Department of War, referring to a construction project at "the Ellis Island, New Jersey, Immigration Station" (NJ 374). Perhaps because of this misidentification, six subsequent internal Department of War documents dealing with the project refer to "Ellis Island, New Jersey" (NJ 375-377, 379-381), although the Assistant Secretary of War's response to Robert's letter is careful to identify the location of the project as "Ellis Island, New York" (NJ 378). And indeed, in a letter three months later, Robert referred to the same project as occurring at "Ellis Island, New York" (NY 302).

In discussing New Jersey's nonacquiescence, the Special Master places greatest emphasis on a 1934 episode initiated by Congresswoman Mary T. Norton of Jersey City (R 132-134). Some historical perspective on this incident helps demonstrate its invalidity as an instance of nonacquiescence.

In 1934, Mayor Frank Hague ran Jersey City. He was a "powerful and ruthless" boss. Dayton D. McKean, *The Boss: The Hague Machine in Action* xiv (1940). "[T]he Washington politicians knew that there was no Democratic organization in New Jersey aside from his," which was "the official state organization through which federal patronage matters would have to be cleared." *Id.* at 102-103. Norton was "Hague's Congresswoman." Richard J. Connors, *A Cycle of Power: The Career of Jersey City Mayor Frank Hague* 86 (1971).

In 1934, as the Special Master noted, "the issue of jobs heated up" (R 132). Hague had orchestrated a "takeover" of the Jersey City unions, which were "friendly satellites in orbit around" him. *Id.* at 100. These unions of course wanted jobs for their members (T 890). During 1934, there was WPA construction work at Ellis Island. Because Ellis Island was

deemed part of New York, however, jobs on the Island went to the New York local branches of unions (NJ 21). This was the setting in which Norton, in May of 1934, wrote to the Assistant Secretary of Labor, informing him "that some of the land upon which buildings are to be erected is in the State of New Jersey and she and Mayor Hague are anxious to have some of this work performed by residents of New Jersey" (NJ 12).

The Labor Department passed the problem on to the Procurement Division of the Public Works Branch of the Treasury Department, which oversaw the project (NJ 14). The Procurement Division, duly advised that "Mrs. Norton and Mayor Hague are interested in seeing that some of the labor on these jobs shall be performed by residents of New Jersey" (NJ 14), got one of the contractors on the project to agree to employ some New Jersey residents (NJ 17). The New Jersey union local remained unsatisfied (NJ 18). Back the matter went to the federal government: from the Procurement Division to the Public Works Administration (NJ 22), and from there to the Federal Emergency Administration of Public Works (NJ 33), which suggested that "[since] Ellis Island is not clearly within the boundary lines of either state and is clearly outside the jurisdiction of either, workers should be drawn in roughly equal proportions from the two States" (NJ 33-34). The matter was then passed on to the Department of Labor, whose Solicitor concluded -- quite erroneously, as the Special Master observed (R 134) -- that, like "the Philippine Islands or Hawaii," Ellis Island and Bedloe's Island "are territories of the United States not falling under the jurisdiction of any one of the forty-eight states" (NJ 43). The Solicitor embraced the "equal proportions" solution, observing that "[i]t seems to me technically skillful, politically wise and thoroughly just" (NJ 43).

Notably absent from this catalogue of attributes was "legally correct," a virtue that seems to have concerned no one until another of the contractors on the project, for the first time in the entire affair, actually investigated the governing law. The contractor called the 1834 Compact to the attention of the Procurement Division (NJ 51), which attempted to turn the matter back over to the Public Works Administration (PWA), noting that "[a]t the time of the earlier [decision], this Division did not have knowledge of such treaty, and it is thought that perhaps it was not considered by you" (NJ 50). The PWA declined to get involved (NJ 51). The decision remained with the Procurement Division, which concluded exactly what the Second Circuit was to conclude fifty-seven years later -- that "Article 2 of

[the 1834 Compact] seems to indicate clearly that New York has jurisdiction over Ellis Island" (NJ 52).

And there the matter remained. Despite Norton's objection that "[a] treaty made in 1834 seems rather antiquated" (NJ 54), the Procurement Division on April 8, 1935 declared that, while "Ellis Island lies within the exterior boundaries of the State of New Jersey," Article Second of the Compact "specified a definite exception to the boundary as established by Article First," and "expresse[d] clearly the intent of the contracting parties that Ellis Island proper should remain in New York State" (NJ 57).

The Special Master mistakes this unsuccessful show of muscle by a member of Congress for an act of state by New Jersey. His erroneous conclusions are threefold. First, he suggests that the episode "diminish[es] New York's prescriptive acts, because [the Solicitor of Labor] posits preemptive federal sovereignty" (R 134). But, as this Court notes and even the Special Master acknowledges, there is no such preemptive federal sovereignty over territory within a state. See, e.g., *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624, 626 (1953) (United States land within territorial boundary of a state "d[oes] not cease to be a part of" the state). Such jurisdiction as remained for a state to exercise over Ellis Island was exercised entirely by New York.

The Special Master then suggests that the episode also shows "New Jersey's resistance to New York's authority, such as it was, over construction in the filled portions of the Island" (R 134). How a single Congresswoman from Jersey City can represent, in the course of several back-channel letters to federal officers, the entire State of New Jersey, is as unclear as how New York, which played no part in the controversy and seems to have been unaware of it, can be said to have joined battle. And quite aside from this, the Special Master overlooks the fact that Norton appeared to be indifferent to the merits of the matter. She thought she could get something for her constituents by force majeure, and she was very nearly correct. But the idea that her show of strength amounts to "New Jersey's resistance" is wholly unwarranted.

Finally, the Special Master concludes that the entire affair "indicate[s] that the States were communicating about labor issues, and by extension, the sovereignty question" (R 134). This is evidently a reference to the fact that the Bricklayers, Masons and Plasterers' International Union

of America had sought a resolution to the problem "in view of the growing friction between the workers of New York and New Jersey" (NJ 21). To the Special Master, this was apparently an instance of New Jersey "assert[ing] her proprietary and sovereign interests . . . through surrogates such as trade unions" (R 136). The Special Master does not offer and New York cannot locate any law suggesting that a labor union can ever, under any circumstances, act as a "surrogate" for a sovereign state.

Thus, the centerpiece of New Jersey's argument and the Special Master's conclusion that New Jersey did not acquiesce in New York's prescription over the filled portions of Ellis Island cannot bear its heavy burden. Mary Norton's brief and abortive back-channel power play was not an act by the State of New Jersey, did not pretend to be rooted in the legal merits of the matter, and failed as soon as anyone scrutinized it closely.

Nor is the Special Master's final example of nonacquiescence during the immigration period any more persuasive. This was a simple attempt by the federal government, without the knowledge or assistance of either New York or New Jersey, to reduce its labor costs. As noted above, under the Davis-Bacon Act the wage paid on federal government projects was the prevailing rate of the locality in which the project was situated. Before 1947, New York City wage scales were applied to work performed on Ellis Island (NY 504-505, 789, 794, 799-800). In 1947, however, the Department of Labor informed the INS that "the New York building trade wage rates, as such, are not applicable to construction on Ellis Island, as far as the data on file in this office would indicate" (NJ 61). Thereafter, over a two-year period, the Department of Labor applied New Jersey wage rates to Ellis Island projects, including those occurring on the unfilled portion of the Island (NJ 68, 71, 72, 74, 78, 85, 87, 90, 441). Suddenly, in 1949, the Department of Labor advised the INS that, because "additional data and more current information" about Ellis Island "have been assembled," its prior decisions about Ellis Island had been amended and New York rates were to be applied to work on the filled portion of "Ellis Island, New York Harbor, New York County, New York" (NJ 90, 91).

The origins of both the 1947 decision to apply New Jersey rates and the 1949 decision once again to apply New York rates remain obscure. But there is no confusion as to the motive behind the 1947 decision. It was not an attempt to reflect accurately state jurisdiction, present or potential, over the Island. Rather, as New Jersey's expert indicated, "[t]he New Jersey

[wage] scale became the emphasis . . . [b]ecause it was lower than that of New York" (T 893). Yet again, in this last example of New Jersey's supposed nonacquiescence, there is an erroneous and expedient federal decision, made without notice to the State of New York, that is corrected as soon as its error is detected. To the Special Master, this episode evidently demonstrated that Ellis Island, including both its filled and unfilled portions, "was understood by the federal government to be in New Jersey" (R 135). But "the federal government" -- as embodied by the office of the Solicitor of Labor, which was solely responsible for the decisions in question -- can no more be said to have "understood" that Ellis Island was in New Jersey than can the Solicitor of Labor who in 1934 suggested a "politically wise" decision that had nothing to do with the legal merits of the matter. Expediency led the federal government into an error. When someone bothered to investigate the situation, the error was corrected.

This handful of episodes is the sum of New Jersey's supposed acts of nonacquiescence in New York's exercise of dominion over Ellis Island during the immigration period. The narrative that the Special Master constructs to account for them is implausible and contradictory. He suggests, on the one hand, that New Jersey's long and conspicuous silences are the product not of acquiescence but of New Jersey's serene confidence -- despite New York's exercise of jurisdiction over the routine affairs of the Island -- that Ellis Island was in federal hands, and that New Jersey thus had nothing to which to object. On the other hand, each and every occasion when it occurred to someone, not always a New Jersey citizen and seldom a New Jersey official, that Ellis Island might possibly be (or be fobbed off as being) in New Jersey counts as a vigilant preservation of New Jersey's sovereign rights. But the "counter-prescriptive" episodes relied on by the Special Master are remarkable not only for their infrequency, but also for their error, their brevity, and their informality. The Harbor Line Board mapmaker in 1890, the Assistant Secretary of the Treasury in 1933, the office of the Solicitor of Labor in 1947-1949 -- these were trees falling silently in a very large forest, federal officials and entities whose erroneous statements were made in intra-agency documents and (in the latter two instances) were corrected in short order. So also was the error, made in response to Congresswoman Norton's naked exercise of power and without consulting New York State, of attempting to divide the jobs on federal construction projects between the unions of the two states. Only twice during this period did anyone from New Jersey assert that Ellis Island belonged to that state: Norton, who was indifferent to the legal merits of the

matter, and an anonymous Hudson County tax official, whose claim of jurisdiction over the whole of (tax-exempt) Ellis Island was both mistaken as a matter of law and so obscure that his (or her) own state was unaware of it. The idea that these fugitive acts tell a story of the State of New Jersey's "consistent assertions of her underlying sovereign claims" (R 144)¹⁰ is unsupported by the record.

Instead, the story of Ellis Island during the immigration period that emerges from the case is this: The jurisdiction remaining to be exercised by a state during this period was exercised by New York. The State of New Jersey took no official steps to dispute New York's sovereignty. On occasion, it occurred to someone in the federal government or in the State (though not the state government) of New Jersey, because of either an honest error or simple expediency, that Ellis Island might be in New Jersey. If and when the mistake came to light, it was swiftly corrected. It is, in short, a story of acquiescence in New York's long-standing and extensive exercise of dominion over Ellis Island, and entitles New York to include all of the Island within its territory today.

POINT III

NEW JERSEY IS GUILTY OF LACHES BY VIRTUE OF ITS DELAY IN COMMENCING THIS ACTION

A. Laches Should be Applied to Original Jurisdiction Cases Involving Interstate Compacts

The Special Master erred in failing to apply the doctrine of laches to this case. Laches should be applicable in general, and has been applied by this Court, to disputes between states involving interstate compacts. Nor, as the Special Master erroneously concluded (R 105), can New York's

¹⁰ The acts of the Board of Riparian Commissioners were, as discussed above, not in the nature of "sovereign claims" and were not claims over the filled portions of the Island. Moreover, even if the 1904 deed is viewed as an instance of nonacquiescence in New York's sovereignty, the outcome of the case does not change. It is the last such instance, and a prescriptive period of more than fifty years is adequate to give sovereignty over the Island to New York. *Cf. Michigan v. Wisconsin*, 270 U.S. at 317 (sixty-year prescriptive period).

concerns about New Jersey's delay in filing suit and the prejudice it has caused New York "be addressed through an analysis of prescription and acquiescence." Laches and prescription and acquiescence apply different criteria in order to vindicate different equitable principles, and are in no way interchangeable.

While this Court has recently noted that it "has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact," *Kansas v. Colorado*, 514 U.S. 673, 687 (1995), the doctrine has been applied in such a dispute by this Court, see *Rhode Island v. Massachusetts*, 40 U.S. (15 Pet.) 233 (1841). The policy considerations underlying the general inapplicability of laches to a sovereign do not apply to disputes between states over interstate compacts.

As the Court has explained,

[t]he rule *quod nullum tempus occurrit regi* -- that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations -- appears to be a vestigial survival of the prerogative of the Crown. [cit om] But whether or not that accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis. [cit om] "The true reason ... is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers" [cit om]

Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938).

New Jersey should not under any circumstances be permitted to take advantage of this rule, for it could not do so in its own state courts. The New Jersey Supreme Court has abrogated the rule of *nullum tempus* in contract cases, concluding that the rule "does not accord with notions of fundamental justice." *N.J. Educ. Facilities Auth. v. Gruzen*, 592 A.2d 559, 561 (N.J. 1991). Moreover, as *Guaranty Trust* goes on to demonstrate, the policy underlying the Court's unwillingness to apply the doctrine of laches against states obviates any hesitation about applying it in the present case, or in any other case involving one state's assertion of rights against another

under a compact between them. In *Guaranty Trust*, the statute of limitations had run against a claim of the Russian government to certain bank deposits in New York. The Court noted that the defenses of laches and the statute of limitations are themselves rooted in "principles of justice" and "serv[e] a public interest." 304 U.S. at 135, 136. Despite the injustice to the defendant that results, they do not apply against a domestic sovereign because of the countervailing "interest of the domestic community of which the [defendant] is a part." *Id.* at 136. But this reasoning "could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it represents." *Id.* Like considerations govern the present case. The public benefit that accrues to a sovereign through application of the rule of *nullum tempus* outweighs the private advantage gained by a litigant, himself a member of that public, who successfully asserts laches. This analysis changes when the contest is between the public interest of two coequal sovereigns. Where, as here, two states are involved, "the public rights, revenues and property" are at stake no matter which state wins. Whichever state prevails, the interest of the public of the other state will suffer a loss. There is thus every reason to apply the otherwise applicable doctrine of laches if it is necessary for a just disposition of the case.

Given the equal rights to be promoted and adjudicated in original actions before this Court, a failure to apply the doctrine of laches in interstate compact cases would work an injustice to those who appear before it. The Court's exercise of its original jurisdiction is "basically equitable in nature." *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973). When "the question of the extent and the limitations of the rights of ... two States becomes a matter of justiciable dispute between them, ... this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them." *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907). But disregarding a crucial equitable doctrine guarantees that the "public rights" of one state will be deemed more important in some cases than the public rights of another, and that in such cases justice will not be done.¹¹

¹¹The United States has taken the view that the doctrine of laches can be applied in interstate compact cases. See Brief for United States at 35-36, *Kansas v. Colorado*, 514 U.S. 673 (1995) (No. 105, Original).

The Special Master concluded that "application of the laches doctrine is not necessary to a just resolution of this case," expressing his "satisf[action] that New York's concerns can be addressed through an analysis of prescription and acquiescence" (R 105). And it is true that this Court has made a suggestion to the same effect. See *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991). But an examination of the two doctrines reveals that they vindicate different equitable principles and depend upon different criteria.

Thus, prescription and acquiescence in a case of this sort seeks to give effect to the practical interpretation given to a compact by the sovereigns that agreed upon it. It requires both "'possession of territory under a claim of right'" by the prescribing state, *id.*, and "'long acquiescence'" in that possession, *id.* (cit om), betokening the acquiescing state's belief that the other state had a right to be where it was. At issue with prescription and acquiescence is "the practical construction given to the boundary by the two states." *Vermont v. New Hampshire*, 289 U.S. 593, 614 (1933). Consequently, when this Court seeks to ascertain whether there was acquiescence by one state in another's exercise of dominion over territory now in dispute, it examines not just whether there has been formal litigation between the states over the territory but also the conduct of the states and their citizens.

The defense of laches involves different concerns. It goes to the need for repose in the disposition of territory and to the unfairness, regardless of the merits of the claim of the party against whom the defense is asserted, of disturbing long-settled arrangements, "especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance." *Hays v. Port of Seattle*, 251 U.S. 233, 239 (1920). Whereas prescription and acquiescence requires that the complaining state actually have been quiescent, so as to assure the other state that its claim of right is accepted, laches is fully compatible with loud saber-rattling by a plaintiff who nonetheless does not follow through with timely litigation.

When a delay in litigation causes prejudice to the defendant, that delay is *in itself* so inequitable as to deprive the plaintiff of any claim. It is for this reason that laches looks exclusively to whether the complaining party has filed suit in timely fashion. As this Court has put it, because "[s]ome degree of diligence in bringing suit is required under all systems of jurisprudence," the question in a laches case is "whether the suit was brought

without unreasonable delay." *Patterson v. Hewitt*, 195 U.S. 309, 317-318 (1904). A lawsuit and only a lawsuit indicates the seriousness of the plaintiff's claim.

The distinction between laches on the one hand and prescription and acquiescence on the other is preserved in international law. Thus, there is "acquisitive prescription," corresponding to prescription and acquiescence, which entails "the removal of defects in a putative title arising from usurpation of another's sovereignty by the consent and acquiescence of the former sovereign" and is based "on considerations of good faith, the presumed voluntary abandonment of rights by the party losing title, and the need to preserve international stability." Ian Brownlie, *Principles of Public International Law* 154 (4th ed. 1990). On the other hand, there is "extinctive prescription," or laches, in which the "lapse of time . . . create[s] equities in favor of the possessor" by virtue of "the difficulty the defendant has in establishing the facts." *Id.* at 154, 505.

Precisely this distinction was observed in one of this Court's earliest cases involving an interstate agreement. *Rhode Island v. Massachusetts*, 40 U.S. (15 Pet.) 233 (1841), involved an 18th Century boundary agreement between the two states. Massachusetts had long occupied the territory in dispute, and argued (in the Court's words) that "after such a lapse of time, [Rhode Island] is barred by prescription, or must be presumed to have acquiesced in the boundary agreed upon; and that if she did not acquiesce, she has been guilty of such laches and negligence in prosecuting her claim, that she is no longer entitled to the countenance of a court of chancery." 40 U.S. at 272. At a preliminary stage of the original action, the Court declined to hold "that the possession of Massachusetts has been such as to give her a title by prescription [,] or that the laches and negligence of Rhode Island have been such as to forfeit her right to the interposition of a court of equity," but permitted Massachusetts, when the action proceeded, to show *either* Rhode Island's "acquiescence with knowledge" *or* that "Rhode Island was guilty of laches in not prosecuting her rights." *Id.* at 274. As this early holding of the Court suggests, prescription and acquiescence goes to the nature and quality of the dominion over disputed territory exercised by the state claiming prescription. Laches, by contrast, focuses on the delay by the complaining state and the results of that delay.

Thus, the Special Master erred in concluding that prescription and acquiescence renders it unnecessary to address the question of laches. Even

if New York did not obtain Ellis Island by prescription and acquiescence, the fact remains that, however strong may have been New Jersey's belief in its own entitlement to Ellis Island, it never until 1993 filed suit to vindicate that entitlement, even as New York was exercising, both during and after the immigration period,¹² sovereignty over the Island. New Jersey's failure to file suit gives rise to a laches defense. Wisely, the Special Master permitted the introduction of evidence into the record enabling the Court "to address laches should it decide to do so" (R 105). Because there is no reason to decline to apply laches in an interstate compact case, and because the issues raised by laches are not addressed in analyzing New York's exercise of dominion over Ellis Island and New Jersey's acquiescence in that exercise, this Court should view the case in terms of laches.

B. New Jersey is Guilty of Laches in Failing Timely to Commence this Action

If laches applies to this case, it applies to defeat New Jersey's untimely assertion of a claim over Ellis Island. New Jersey's decades-long delay, coupled with the prejudice that delay has caused New York in making its case, means that New Jersey's claim that it is entitled to sovereignty and jurisdiction over any portion of Ellis Island must fail.

As this Court has noted, a defense of laches has two elements. It "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Kansas v. Colorado*, 514 U.S. at 687 (cit om). There can be no doubt as to New Jersey's lack of diligence. Indeed, the more readily one accepts New Jersey's own account of its role in Ellis Island's history, the more

¹²With Ellis Island under the authority of the National Park Service (NPS), New York continued to exercise a measure of jurisdiction over the Island. New York provided unemployment insurance for NPS employees at Ellis Island (T 3175), and the NPS distributed to its employees on the Island an information packet including a "City of New York Certificate of Nonresidence" for New York City tax purposes (NY 943; T 3167). Between 1987 and 1991, the NPS applied for and received from New York State permits to build and operate an incinerator on Ellis Island (NY 903-911). New York, unlike New Jersey, collected personal and corporate income taxes and sales and use tax deriving from restoration, construction, and the operation of concessions on Ellis Island (NY 919, 941; T 3231-3240, 3488-3489, 3492-3496).

manifest its lack of diligence seems. According to New Jersey, its Board of Riparian Commissioners contemplated action to vindicate its rights -- by New Jersey's account, rights not only of ownership but of sovereignty -- even before Ellis Island opened as an immigration center (NJ 1). Even after New Jersey conveyed to the United States title to the subaqueous land surrounding the Island, New York continued to exercise such jurisdiction over the Island as remained to be exercised by a state. If, as New Jersey says, its occasional efforts to obtain some benefit from Ellis Island over the next half century amounted to an assertion of sovereignty, then its failure to bring suit to vindicate its position is even more difficult to fathom.

New Jersey may argue that until the INS abandoned Ellis Island, a stake in the disposition of the Island was not worth suing over. But it was at precisely that point that its laches intensified. The INS abandoned Ellis Island in 1954; by New Jersey's account, public discussion of how to dispose of it began almost at once. By 1960, a Senate subcommittee was holding hearings on the possible uses of the Island (NJ 143). In that same year, Salvatore A. Bontempo, Commissioner of the New Jersey Department of Conservation and Economic Development and Chairman of the New Jersey Commission on Interstate Cooperation, took the position that New Jersey had jurisdiction over Ellis Island, referred the matter to the State Attorney General for further consideration, and strongly intimated that the impasse between the states would force him to take the dispute to federal court (NJ 133, 134). No litigation followed. Instead, New Jersey waited yet another thirty-three years to commence this suit. This long and unexplained delay satisfies the requirement that New York demonstrate New Jersey's lack of diligence in asserting its claim.

New Jersey's delay in filing suit greatly prejudiced New York. As this Court has noted, "[t]he law of laches . . . is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society." *Brown v. Buena Vista Co.*, 95 U.S. 157, 161 (1877). In the present case, New Jersey's lack of diligence has affected, first of all, the availability of "the muniments of evidence." Documents that might support New York's claim and illuminate the views of the federal government and of individual citizens on sovereignty over the landfilled portions of Ellis Island are now irretrievably lost.

This is true, for instance, of tax documents. The Special Master complained that "New York failed to present more than a scintilla of evidence of her taxing authority in the relevant prescriptive periods before 1955" (R 130). But states do not retain tax records indefinitely. New Jersey waited to file this suit for nearly forty years after Ellis Island ceased to have any residents or to be the home of a significant work force. Any evidence that New York imposed its income tax on those who lived or worked on Ellis Island during the immigration period has long since vanished.

Nor are these the only unavailable documents that might assist New York's case. The tide of time first washes away the most quotidian records of life; documents involving affairs of state take longer to erode. A portion of New York's case is based on the proof derived from routine documents -- marriage licenses, certificates of birth and death, letterheads, postmarked envelopes, unremarkable business transactions -- that are the first to be swallowed by history under any circumstances. This is especially problematic in the present case because the heyday of Ellis Island as an immigration center ended thirty years before the INS abandoned the Island. The greatest concentration of documents probative of New York's case presumably would date from no later than 1924, when changes in the immigration law diminished Ellis Island's role in American life. New Jersey's delay in filing suit assures that these documents are gone.

Moreover, the particular circumstances of Ellis Island increase the likelihood that records helpful to New York's case have vanished. In 1954, when the INS abandoned Ellis Island, "the people just left" (T 1959). From 1954 until 1965, Ellis Island was overseen by the General Services Administration (GSA). In 1965, when the Island became the responsibility of the NPS, GSA cut off the heat and other utilities at the Island, and kept only a single guard there, who patrolled only during daylight hours (NJ 162 p 187). Because Congress did not actually appropriate the funds it had authorized for Ellis Island in 1965, the NPS was deprived of the money necessary to maintain guards and police dogs on the Island (NY 74 p 1170).

The results were predictable. Harbor pirates came ashore and "carr[ied] off chairs, desks, metal piling and anything else that was portable" (NJ 162 p 187). "Leaky roofs went unrepaired....On the lower floors water accumulated in places to a depth of several inches....Pilferage and vandalism continued" (NJ 162 p 187). By 1966 "the place was rapidly becoming a group of ruins" (NJ 162 p 187). Not until 1976, when Congress

appropriated funds for Ellis Island, could the NPS afford to post a 24-hour guard on the Island (NY 74 pp 1190-1191). And even thereafter, loss and decay continued. An inspection tour of the Island by NPS personnel in 1978 revealed "a whole variety of...historical documents from the immigration period" not only in boxes and file cabinets but also "spilled on the floor" and otherwise "all over the place," with some "in better shape than others" (T 1957, 2478).

It is in the loss of such documents, neglected and presumably stolen, misplaced or damaged over a period of nearly a quarter-century, that the prejudice to New York from New Jersey's delay partly resides. In the Special Master's view, New York's prescriptive acts were "isolated," "episodic" or "intermittent" (R 118, 144). While this is itself incorrect, the unanimity of the evidence of prescription suggests that, had New Jersey not delayed its suit and documents not been irretrievably lost, the evidence presented by New York could have been even stronger, bridging the gaps that were, for the Special Master, fatal to New York's case.

To the Special Master, "[b]ecause it is impossible to know from the record whether [New York's] speculation [i.e. "that documents may have been destroyed prior to the time suit was commenced"] is correct," no prejudice to New York's case could be found (R 104-105). But of course, that is precisely the point. Given the nature of the proof of prescriptive acts offered by New York and the likelihood, by virtue of both the workings of time and the long abandonment of Ellis Island, that many useful documents have vanished, New Jersey's delay until 1993 in filing suit has caused substantial prejudice to New York.

Nor is it merely by virtue of missing documentary evidence that New Jersey's laches has harmed New York. Fully as critical a loss to New York is the testimony of living witnesses who were familiar with the operations and circumstances of Ellis Island during the immigration period. Such evidence would have been helpful on at least two matters. First, in the Special Master's view, "because no poll was taken, we will never know for certain in which State most immigrants perceived they were landing" (R 129). What those who actually lived and worked on Ellis Island believed about where they were living and working obviously has bearing on the issue of prescription and acquiescence. See *Maryland v. West Virginia*, 217 U.S. 1, 41 (1910) (how residents "regarded themselves as citizens" is relevant to prescription and acquiescence). Had New Jersey filed suit less than forty

years after Ellis Island was abandoned, New York might have presented testimony on this issue sufficient to satisfy the Special Master.

The bind into which New Jersey's delay has thrust New York is epitomized by the Special Master's dismissive reference to the memories of a fact witness who resided on Ellis Island as a child (R 115 n 44). People who were adults during the heyday of Ellis Island as an immigration station have long since died. What they believed about and did on the Island is forever irrecoverable -- the more so since New York's day-to-day jurisdiction over Ellis Island was so noncontroversial as rarely to have been remarked upon by the Island's residents and workers at the time.

But New Jersey's delay has deprived New York of valuable testimony in a further important way. What is striking about New Jersey's proof of "counter-prescription," such as it is, is its fragility. It depends upon the words and actions of a handful of people: Congresswoman Mary Norton, Commissioner Edward Corsi, the 1890 Harbor Line Board mapmaker, a Hudson County tax assessor, a few federal officials. Had New Jersey filed suit sooner than 1993, it might have been possible to inquire specifically into the motivations of these individuals, their comprehension of the issues underlying jurisdiction over Ellis Island, and the meanings of their acts. Now that is impossible.

As this Court long ago observed, "[n]o human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals." *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 639 (1846) (finding acquiescence by Rhode Island in Massachusetts' prescription). Thus, for example, in *Indiana v. Kentucky*, 136 U.S. 479 (1870), the Court found dispositive Indiana's delay in bringing suit over disputed territory for some seventy years after its admission to statehood:

On that day [of Indiana's admission], and for many years afterwards...there were, perhaps, scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two states now hinge; and yet she waited for over 70 years before asserting any claim whatever [to the land in question].

Id. at 509 (Indiana acquiesced in Kentucky's prescription).

The same applies here. New Jersey, by its own account, could have sued New York over Ellis Island at some point before 1993. Its delay in asserting its claim to the landfilled portions of Ellis Island deprived New York of valuable additional dispositive documentary evidence and testimony. Accordingly, New Jersey is guilty of laches, and cannot prevail.

CONCLUSION

FOR THE FOREGOING REASONS, THE COURT SHOULD REJECT THE REPORT OF THE SPECIAL MASTER RECOMMENDING THAT THE STATE OF NEW JERSEY BE DECLARED SOVEREIGN OVER THE LANDFILLED PORTIONS OF ELLIS ISLAND, AND ISSUE A DECREE DECLARING THAT THE ENTIRETY OF ELLIS ISLAND IS IN THE TERRITORY AND SUBJECT TO THE SOVEREIGNTY OF THE STATE OF NEW YORK.

Dated: Albany, New York
July 30, 1997

Respectfully submitted,

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APPENDIX

COMPACT OF 1834

Act of June 28, 1834, 4 Stat. 708 (1834)

CHAP. CXXVI.—*An Act giving the consent of Congress to an agreement or compact entered into between the state of New York and the state of New Jersey, respecting the territorial limits and jurisdiction of said states.*

WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:

Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance of an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18, 1833, of the one part; and Theodore Frelinghuysen, James Parker, and Lucius Q.C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

ARTICLE SECOND. The State of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, *Provided*, That the navigation be not obstructed or hindered.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over the waters of the sound from the westernmost end of Shooter's Island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan bay lying westward of a line drawn from the lighthouse at Prince's bay to the mouth of Mattavan creek; subject to the following rights of property and of jurisdiction of the state of New York, that is to say:

1. The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New Jersey, which now exist or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and middle of said waters: *Provided*, That the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH. Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offence committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid; or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof; may be served upon any of the said waters within the exclusive jurisdiction of the state of New York, unless such person or property shall be on board a vessel aground upon, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this sixteenth day of September, in the year of our Lord one thousand eight hundred and thirty-three and of the independence of the United States the fifty-eighth.

B.F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR,
THEO. FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q.C. ELMER.

And whereas the said agreement has been confirmed by the legislatures of the said states of New York and New Jersey, respectively,—therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, *Provided,* That nothing therein contained shall be construed to impair or in any manner effect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

APPROVED, June 28, 1834.

AUG 29 1997

CLERK

IN THE

Supreme Court of the United States

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

REPLY OF THE STATE OF NEW YORK TO EXCEPTIONS OF THE STATE OF NEW JERSEY TO THE REPORT OF THE SPECIAL MASTER

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No. 120, Original

In The

Supreme Court of the United States

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**REPLY OF THE STATE OF NEW YORK TO
EXCEPTIONS OF THE STATE OF NEW JERSEY
TO THE REPORT OF THE SPECIAL MASTER**

STATEMENT OF THE CASE

The statement of the case of the State of New York appears at pages 2 through 9 of its Exceptions to the Report of the Special Master.

SUMMARY OF ARGUMENT

Under the 1834 Compact, New York's sovereignty over Ellis Island is not limited to the high water mark of the Island as it existed at the time of the Compact. During the unsuccessful 1827 negotiations between the states, New Jersey conceded that

New York already possessed exclusive jurisdiction over the Island to the low water mark. Nothing indicates that, with the Compact, New York relinquished to New Jersey its jurisdiction between high and low water. The Compact's grant to New Jersey of an exclusive right of property in the "land under water" surrounding Ellis Island does not change this conclusion, for at the time of the Compact "land under water" extended to but not above the low water mark. The Court has noted, moreover, the obvious impracticality of establishing a sovereign boundary at the high water mark, and recognizes the common-law principle that a country bounded by tidal waters extends to the low water mark. Although the Compact does not expressly limit New Jersey's exclusive right of property over underwater land to the low water mark, while it does explicitly award New York jurisdiction over subaqueous land "to the low water-mark" on the New Jersey side of New York Bay, this does not mean that New Jersey's property right extends to the high water mark of New York's sovereign territory. Rather, the Compact is silent about low or high water when establishing such a boundary is irrelevant. It was irrelevant with respect to Ellis Island because the states recognized in 1834 that New York could and would expand Ellis Island beyond its low water mark at the time by means of landfill.

The Special Master correctly concluded that the pier in existence on Ellis Island in 1834 was built on landfill. New York presented convincing evidence that, given the depth to which piles would have to be driven to support this pier, the state of the art of pile-driving in New York Harbor in the early 1800s, the likely use of the pier to support transportation of heavy building materials and ordnance to the fort on the Island, and the ease of using landfill in the shallow water adjoining Ellis Island, the pier was built on fill.

The Special Master's division of sovereignty over Ellis Island between New York and New Jersey was an erroneous and impractical idea. The entire Island has been and should remain subject to New York's exclusive sovereignty. But if Ellis Island must be divided between the states according to its "original" and filled portions, it should be divided as the Special Master proposes, in order to guarantee that authority over individual buildings is not shared and that New York's portion of the Island is not landlocked.

ARGUMENT

POINT I

NEW YORK'S SOVEREIGNTY OVER ELLIS ISLAND IS NOT LIMITED TO THE MEAN HIGH WATER LINE OF THE ISLAND AS IT EXISTED IN 1834, BUT INSTEAD EXTENDS TO THE ENTIRETY OF THE ISLAND AS IT EXISTS TODAY

Under the 1834 Compact, New York's sovereignty is not limited, as New Jersey mistakenly suggests (Br, pp 28-38), to the mean high water line of Ellis Island as it existed at the time of the Compact. Article Second of the Compact is silent on this subject, awarding Ellis Island to New York without limitation. But the history of Compact negotiations and the law as declared by both this Court and New Jersey's own highest court shows that, as of 1834, New York was sovereign over all of Ellis Island to its mean low water mark. Indeed, an examination of the very provisions of the Compact relied on by New Jersey further demonstrates the correctness of New York's position that the Compact awards to New York all of the Island as it exists today.

The Special Master, in concluding that the boundary on the Island should be drawn at the low water mark, first examined the history of the negotiations of the Compact (R 153-154).¹ As he noted, the First Proposition made by New Jersey during the course of the unsuccessful 1827 negotiations included the proposal "[t]hat the islands called Bedlow's Island, Ellis' Island, Oyster Island, and Robins' Reef, to low water mark of the same, be held to be and remain within the exclusive jurisdiction of the State of New York" (NJ 274). The Special Master observes that the "low water mark" language "was not contained in Article Second of the Compact," but that "nothing in the pre-Compact negotiations contradicted such a construction" (R 153). While the Special Master is correct, he misses a more significant aspect of the proposal, which is that it employs, uniquely in the context of Compact negotiations, the term "remain," indicating that the islands mentioned in New Jersey's Proposition were by 1827 in New York's possession to their low water marks. Thus, New Jersey is simply incorrect in arguing (Br, p 34) that "[b]efore the Compact was adopted, New Jersey did not agree that New York's 'present jurisdiction' extended to low water." It conceded as much in 1827, and there is no reason to imagine that, in the Compact the states eventually produced, New York relinquished its sovereignty over Ellis Island between (and only between) low and high water.

New Jersey urges the Court (Br, pp 32-34) instead to consult its 1829 Complaint in this Court. But the Complaint can also be read to support New York's position. In that pleading, New

¹Parenthetical citations preceded by "R" are to the Final Report of the Special Master. Parenthetical citations preceded by "T" are to the trial transcript. Parenthetical citations preceded by "NY" are to the numbered exhibits submitted by the State of New York, and those preceded by "NJ" are to the numbered exhibits submitted by the State of New Jersey.

Jersey contended that, while New York had enjoyed "long continued possession" of the islands in New York Bay, that possession "ha[d] been uniformly confined in its exercise to the fast land thereof," such that "the title of New Jersey to the whole waters of the Staten Island sound remains clear and absolute" (NJ 293, p 23). New Jersey's argument is based on the suggestion that "fast land" is used in the Complaint as a term of art meaning territory above the high water mark. While it can certainly have this meaning, *see, e.g., United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945), "fast land" can also be used more informally to contrast with the "submerged lands" covered by water at low tide, *see, e.g., Scranton v. Wheeler*, 179 U.S. 141, 163 (1900); *Hill v. United States*, 149 U.S. 593, 595 n. 1 (1893). New Jersey's contrast of "fast land" with "the whole waters" of the Bay makes it likely that the term was used in this latter sense in the 1829 Complaint, especially in view of New Jersey's 1827 concession that New York had jurisdiction over the islands in the Bay to low water.

The prevailing law at and after the time of the Compact likewise makes clear that the Compact's award of Ellis Island to New York encompassed the Island to its low water mark. New Jersey is simply wrong in suggesting otherwise (Br, pp 30-32).

This is not a case, as the Special Master recognized (R 152-153), that has anything to do with the many decisions holding that a sovereign's conveyance of land bounded by the sea or any navigable tidewater does not, in the absence of a clear indication to the contrary, pass any title below high water mark. *See, e.g., Shively v. Bowlby*, 152 U.S. 1, 13 (1894); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 220 (1845); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842); *City of Mobile v. Hallett*, 41 U.S. (16

Pet.) 261, 265 (1842).² As this Court has explained, this holding derives from the common-law rule that the land below high water is held by the sovereign in trust for the public good. *Shively*, 152 U.S. at 16.

Indeed, although New Jersey attempts to rely on this group of cases, they undermine its argument. According to New Jersey (Br, p 31), the cases demonstrate that "[w]hen the Compact was adopted, the term 'lands under water' was understood to include all tidally-flowed lands, up to the mean high water mark." But this is simply untrue. As this Court has recognized, under the common law "the land between ordinary high and low water mark" is called the "shore." *United States v. Pacheco*, 69 U.S. (2 Wall.) 587, 590 (1864); accord, *Shively*, 152 U.S. at 12. Both this Court and New Jersey's highest court have taken pains to distinguish between "the shore" and "lands under water." *Hardin v. Jordan*, 140 U.S. 371, 381 (1891); *Bell v. Gough*, 23 N.J.L. 624 (N.J. 1852) (distinguishing "shore" and "soil under water"). "Lands under water" thus extend to, but not above, the low water mark.

The incongruity and inconvenience of permitting one sovereign to assert its sovereignty up to the high water mark of another's territory prompted creation of a straightforward common-law rule that is fatal to New Jersey's argument. In

²This is also not a case, as New Jersey suggests (Br, p 30), involving the question of whether the Court should adopt an *ad hoc* definition of "island" contained in a different Special Master's decree. See *United States v. California*, 382 U.S. 448, 449 (1966). And it has nothing to do, despite New Jersey's contention otherwise (Br, p 30), with whether Ellis Island is an "island" as that term is defined in the international Convention on the Territorial Sea and the Contiguous Zone dating from 1958. See *United States v. Alaska*, 117 S. Ct. 1888, 1900 (1997).

Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374, 383 (1820) (Marshall, C.J.), the Court recognized "[t]he principle that a country bounded by a river extends to low water mark, a principle so natural, and of such obvious convenience as to have been generally adopted." "This rule," the Court said,

has been established by the common consent of mankind. It is founded on common convenience. Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water * * *. Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark.

Id. at 380-81.

New Jersey contends (Br, p 38) that "*Handly's Lessee* does not support the Master's conclusion," for "under the Compact New Jersey is not bounded by the shore of the Hudson River and New York Bay, but is bounded by the middle of the Hudson River and the Bay." The obvious point of the Special Master's reliance on *Handly's Lessee*, however, is that *New York*, in its role as sovereign over Ellis Island, is bounded by New York Bay, and thus that the subaqueous territory of New Jersey (like that of Kentucky in *Handly's Lessee*) extends only to the low water mark.

Apparently, the mind of New Jersey, unlike that of Chief Justice Marshall, does not find itself embarrassed to disregard the insurmountable difficulty of making one state sovereign over the

foreshore of territory otherwise controlled by another, instead treating the obvious problems as "unsubstantiated practical concerns" (Br, pp 36-37). This is the phrase New Jersey applies to its ability, under its interpretation of the Compact, to forbid New York access to Ellis Island at low tide. Indeed, as the Special Master recognized (R 155), permitting New Jersey to do what it pleased with the shore of Ellis Island might have cut off entirely New York's sovereign territory on the Island from New York Harbor. See, e.g., *City of Hoboken v. Pennsylvania R. Co.*, 124 U.S. 656 (1887) (under New Jersey law, state legislature could grant "lands constituting the shore . . . below high-water mark" to another so as "to cut off the access of the riparian owner from his land to the water . . . without making compensation to him for such loss").

Nor is New Jersey correct in suggesting (Br, pp 34-36) that "practical construction of the Compact since 1834 supports New Jersey's interpretation." New Jersey's argument is this: New York's 1808 conveyance of title to Ellis Island to the United States was to "ordinary high water" (NY 92). In 1880, New York conveyed to the United States land "contiguous to the lands of the United States" at Ellis Island (NY 93). In 1904, however, according to New Jersey, the United States Attorney General "explicitly determined that the 1880 deed and cession of jurisdiction was of no force and effect," and obtained a deed to the same land from New Jersey (NJ 338).

This episode is irrelevant to the question of New York's dominion, under the Compact, over the shore of Ellis Island. As discussed earlier in this section, a sovereign's conveyance of title to land bounded by tidewater does not convey title below the high water mark. New York's 1808 deed to the United States, expressly following this common-law rule, was simply a careful exercise of the conveyancer's art. New York's 1880 deed purported to convey, *inter alia*, the land between high and low

water at Ellis Island. Because New York owned this land and was empowered to transfer it, the 1880 conveyance remained effective as to it. And the United States Attorney General, in 1904, did not "explicitly determin[e] that the 1880 deed and cession of jurisdiction was of no force and effect." Rather, he observed only "that the ownership of the lands under water west of the middle of the Hudson River and the Bay of New York is in the State of New Jersey" (NJ 338).³ The foreshore of Ellis Island, which was retained by New York under the 1834 Compact and was not "land under water," passed to the United States in the 1880 deed.⁴

³As discussed in New York's Brief on Exceptions (pp 30-31), both New Jersey's insistence on compensation for the United States' use of New Jersey's subaqueous land for emplacement of the landfill that became part of Ellis Island and the United States' response to that insistence are perfectly consistent with the fact that under Article Second of the Compact, landfill added to Ellis Island was subject to New York's sovereignty.

⁴Because New Jersey invites the Court to "revisit the Special Master's analysis" on the question of whether the United States' jurisdiction over Ellis Island left New York "with far too little governmental authority upon which to claim prescription" (Br, p 14 n 8), it is necessary to note that the Special Master erred in understating the extent of New York's authority over Ellis Island, and thus the scope of its prescriptive activities. Even federal jurisdiction far more complete than the United States has over Ellis Island does not preempt or exclude state laws. *See, e.g., James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940) (New York Labor Law requiring that steel beams at construction site be "planked" remained in effect even though United States had exclusive jurisdiction over post office site); *Chicago, R.I. & P.R. Co. v. McGlinn*, 114 U.S. 542, 546 (1885) (even upon cession of exclusive jurisdiction to United States, state laws "affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, remain in effect").

Thus, even though the Compact is silent on the subject of whether Ellis Island as it existed in 1834 was retained by New York to its high water or low water mark, the history of the Compact negotiations and the law of both this Court and New Jersey's highest court establish that the "Ellis Island" of 1834 lay within New York to its low water mark. New Jersey now argues (Br, pp 30-32) that the fact that Article Third of the Compact awards New York "exclusive jurisdiction . . . of and over the lands covered by the said waters [i.e. of New York Bay and the Hudson River] to the low water-mark on the westerly or New Jersey side thereof," whereas "Article II does not state that New York's jurisdiction on Ellis Island extends to low water," means that "the States intended to strictly limit New York's jurisdiction on Ellis Island to the Island above mean high water."

No such inference is justified. First, as discussed above, a water-land boundary between sovereigns is, for obvious practical reasons, at the low water mark. The Compact's silence on this subject suggests that it simply follows this practice. Nowhere in the Compact is there a reference to the high water mark.

The explicit reference to low water in Article Third can be explained by the fact that the term was necessary to resolve a key aspect of the controversy between the two states. New Jersey's 1829 Complaint avers that New York "ha[s] lately asserted an absolute and exclusive right of property, jurisdiction and sovereignty, over all the waters of the Hudson River and Bay, and Staten-Island sound; and that quite up to high water mark on the New-Jersey shore" (NJ 293 p 23)—a claim which New York based on specific prior royal and proprietary grants (NJ 203, 205). The question of the geographical extent of New York's jurisdiction over the River and Bay west of the mid-point was, obviously, a vexed and vexing question for the Commissioners, who resolved it by addressing the matter expressly in the

Compact. By contrast, New York's sovereignty over the islands in the Bay to the low water mark was conceded by New Jersey and in keeping with general practice. There was no need to reconfirm it in the Compact.

New Jersey's approach to the Compact, far from suggesting that New York is sovereign over Ellis Island only to the high water mark, actually supports the interpretation of Article Second of the Compact offered in New York's Brief on Exceptions. The Compact mentions underwater lands at three points: Article Third's mention of New York's "exclusive jurisdiction . . . over the lands covered by" the River and Bay "to the low water-mark" on the New Jersey side; the same Article's grant to New Jersey of "the exclusive right of property in and to the land under water lying west of" the mid-point of the River and Bay; and Article Fifth's award to New York of "the exclusive right of property in and to the land under water lying between the middle of the said waters [i.e. those "between Staten Island and New Jersey"] and Staten Island." Only one of these provisions mentions either high or low water. Indeed, it is the failure to limit New Jersey's "exclusive right of property" in Article Third to low water that, as New Jersey sees it (Br, p 31), gives the state sovereign rights to the high water mark of Ellis Island.

But there is a better explanation. The limitation in Article Third of New York's exclusive jurisdiction over underwater land precisely settles an important and contested issue between the states. The failure to specify the extent of New Jersey's property rights in Article Third, as with the parallel provision addressing New York's property rights in Article Fifth, can be accounted for by its irrelevance. That this is true is particularly evident under Article Fifth. Specifying high or low water in that Article was irrelevant because the Compact undisputedly left New York sovereign over everything east of the mid-point of the waters

between New Jersey and Staten Island. There was thus no reason to specify that the "exclusive right of property" over the land under these waters—a right that, according to New Jersey and this Court, *see Central R.R. Co. v. Mayor of Jersey City*, 209 U.S. 473, 478 (1908), is in the nature of sovereignty—extends to high or low water of territory over which New York is in any event sovereign.⁵

As to New Jersey's exclusive right of property in Article Third: The Compact was silent because it intended to confine New York's sovereignty over Ellis Island and the other islands retained by New York under Article Second to *neither* low nor high water. As demonstrated at length in New York's Brief on Exceptions (pp 11-21), both states in 1834 envisioned that the islands awarded New York, like other land in New York Harbor, would be extended by fill to and beyond their original low water lines. Limiting New York's sovereignty over these islands to either low or high water would have thwarted this purpose.

The Compact's silence with respect to low and high water in Article Second means, at the very least, that New York's sovereignty over Ellis Island extends to the low water mark on the original Island. But this silence, viewed in the context of the Compact's other mentions of rights in underwater land, suggests that, as New York demonstrates elsewhere, the Compact envisions geographical expansion of Ellis Island by landfill

⁵The fact that the Compact awards New York the exclusive right of property only over the underwater land east of the mid-point between New Jersey and Staten Island indicates that New Jersey has the equivalent exclusive right west of that mid-point. But no clash between New Jersey's exclusive right of property and New York's sovereignty results because there are no islands subject to New York's sovereignty west of this mid-point.

beyond the low water mark and a coextensive expansion of New York's sovereignty.

POINT II

THE SPECIAL MASTER CORRECTLY CONCLUDED THAT THE PIER ON ELLIS ISLAND WAS BUILT ON LANDFILL

As the Special Master recognized (R 158-159), abundant evidence in the record establishes that a pier on Ellis Island that was in existence at the time of the Compact was built on artificial fill. New Jersey, seeking to seize more territory by pushing back the high-water mark on Ellis Island, now argues (Br, pp 46-48) that the Special Master's conclusion lacks any "credible evidence" to support it. In fact, however, all credible evidence supports the Special Master's conclusion.

The L-shaped pier in question is clearly depicted, angling from the southwest side of the Island, on an 1819 Map entitled "Ellis Island Fort Gibson" (R App J). The Special Master concluded that much of this pier was supported by artificial fill for two reasons: the 1819 map⁶ "shows a filled area around at least two thirds of the dock," and New York's expert, Dr. Donald F. Squires, indicated that the pier, which was used "to carry ammunition by rail car to the cannons at the Fort Gibson redoubts," needed "to be structurally sound," and thus to rest on fill, because "pile-driving techniques (as an alternative to fill) adequate to hold such weight were not in use at that time" (R 159).

⁶New York agrees with New Jersey (Br, p 47 n 20) that the Special Master's reference in this context to an "1839 chart" (R 158) must be a typographical error, and that the Special Master intended to refer to the 1819 map.

On the first of these points there is no disagreement between the parties. New Jersey's expert testified that "[t]here is land on either side of the pier" and that this was consistent with either the presence of fill around and beneath the pier or "accretion" of "sediment" in "closely placed pilings" supporting the pier "that could have trapped the material" (T 277, 282). Dr. Squires agreed: around the pier, he said, the 1819 map shows "material that was either placed or has accumulated," indicating that the pier was either "on landfill" or "supported by a . . . sufficiently dense number of spaced pilings, so that it was indeed accumulating sediment" (T 2929).

The remainder of Dr. Squires' testimony on this subject demonstrated that the pier could have been built only on landfill, not on pilings. He noted that the pier appears in both the 1819 map and earlier maps, during periods when the United States was constructing, fortifying, and supplying Fort Gibson on Ellis Island (T 3023). Construction of Fort Gibson would have required stone, which is not found naturally on Ellis Island, as well as bricks and mortar (T 3029). When the fort was completed, cannon were emplaced on the Island, and ammunition supplied for these (T 3029). Barges carrying heavy building materials or ordnance could not conveniently have landed elsewhere on the Island, for the depth of water they need in order to float would in turn have required that their cargo be unloaded far from the fort and "carr[ied] across the muddy, silty sediments surrounding the Island" (T 2932, 2934-35, 3033-34).

Thus, there is no doubt that supplies for Ellis Island were brought to the pier. The only question is whether that pier was built on fill or on piles, and Dr. Squires demonstrated that it was almost certainly built on fill. Although not a licensed engineer, he was qualified as an expert in marine engineering (T 2831, 2834), and explained that the use of pilings would have been

grossly impractical. Pilings, he explained, are driven through soft sediment under water until they reach the hard substrate beneath (T 3022). In the early 1800's, pilings would have been used principally "where hard substrate was near the surface of the bottom" (T 3022). But at Ellis Island, where there were nine or ten feet of soft sediment above the hard substrate, "[i]t would not have been state-of-the-art to drive pilings to that depth in 1819," for "the ability to drive a piling" did not yet exist (T 2932, 3022). Indeed, the use of pilings before the mid-1800's was "highly uncommon," and "pile-supported piers constructed where there was soft sediment were not in...general use in New York Harbor prior to the late 1800's" (T 3026-27). Conversely, the very shallow water around the pier made landfill an easy technique: the water is no more than three feet deep, and consequently "[i]t would not have been a feat of any difficulty to create that pier with solid fill" (T 2932, 3023).

This was, the Special Master recognized, informed speculation (T 2933), persuasive through the force of Dr. Squires' reasoning and his expertise in marine engineering. A pier sufficiently sturdy for its intended use could have been built either with great difficulty by means of a technique that was "highly uncommon" at the time of its construction or by means of a simple, obvious and widely recognized method. The former, Dr. Squires noted, was possible only in the sense that "[a]nything is possible" (T 3023).

Against Dr. Squires' expertise and logic, New Jersey offers nothing. Its entire evidence on the subject consists of this: Asked "whether the pier [in the 1819 map] was constructed by artificial filling," New Jersey's expert opined that "[t]here is no conclusive evidence of that" because "[y]ou can't tell by looking at the pier [on the map] what is underneath it" (T 277). In other words, because the 1819 map did not include a label saying "artificial

landfill," New Jersey declined to inquire any further. Under these circumstances, a rejection of Dr. Squires' testimony would have been unsound. The record contains no credible evidence to support any conclusion but that the pier on Ellis Island in 1834 was built on landfill.

POINT III

ALTHOUGH THE SPECIAL MASTER'S DIVISION OF SOVEREIGNTY OVER ELLIS ISLAND WAS ERRONEOUS, HIS EQUITABLE APPROACH TO DIVIDING SOVEREIGN TERRITORY WAS VALID

As demonstrated in New York's Brief on Exceptions, the Special Master erred profoundly in awarding sovereignty over any of Ellis Island to New Jersey. The 1834 Compact, the principles of prescription and acquiescence, and the doctrine of laches all indicate that the entirety of the Island belongs to New York. The Brief *amici curiae* of the National Trust for Historic Preservation in the United States and the Municipal Art Society of New York, moreover, demonstrates at length that splitting sovereignty over Ellis Island is a bad and impractical idea. It will require continuing supervision by this Court over the boundaries established by the Special Master, will create a "checkerboard" jurisdiction that will leave officials uncertain of which state's jurisdiction applies, will invite conflicts between the different preservation programs of New York and New Jersey, and will require application of inconsistent landmark laws on the Island, thus potentially hindering preservation and rehabilitation. As *amici* conclude (Br, pp 22-27), if equity applies to this case, it applies to keep Ellis Island subject to a single sovereign.

If, however, the Court nonetheless concludes that the Special Master correctly awarded the landfilled portions of Ellis Island

to New Jersey, it should follow his division of the territory on the Island. As the Special Master noted, a "template approach" of superimposing the supposed contours of the 1834 Island on the present-day Island "introduces impracticalities and inconveniences" (R 162). Rather than dividing three important buildings on the Island between the states, the Special Master sensibly awarded one building to New York and the other two to New Jersey, thus avoiding conflicts even more acute than the ones already bound to occur. By avoiding an outcome that leaves New York "with relatively thin strips of New Jersey's sovereign territory between New York and the ferry slip" (R 163), the Special Master at least assures that New York will not be "enclaved by New Jersey on the Island" and that New York City's operation of "Circle Line boats delivering millions of visitors annually to this location" will not be "disrupt[ed]" (R 163). Although both the 1834 Compact and subsequent events have produced an Ellis Island that has been and should remain subject to New York's exclusive sovereignty, an Island divided according to its "original" and filled portions should be divided as the Special Master proposes.

CONCLUSION

FOR THE FOREGOING REASONS, THE COURT SHOULD REJECT THE REPORT OF THE SPECIAL MASTER RECOMMENDING THAT THE STATE OF NEW JERSEY BE DECLARED SOVEREIGN OVER THE LANDFILLED PORTIONS OF ELLIS ISLAND, AND ISSUE A DECREE DECLARING THAT THE ENTIRETY OF ELLIS ISLAND IS IN THE TERRITORY AND SUBJECT TO THE SOVEREIGNTY OF THE STATE OF NEW YORK.

Dated: Albany, New York
August 29, 1997

Respectfully submitted,

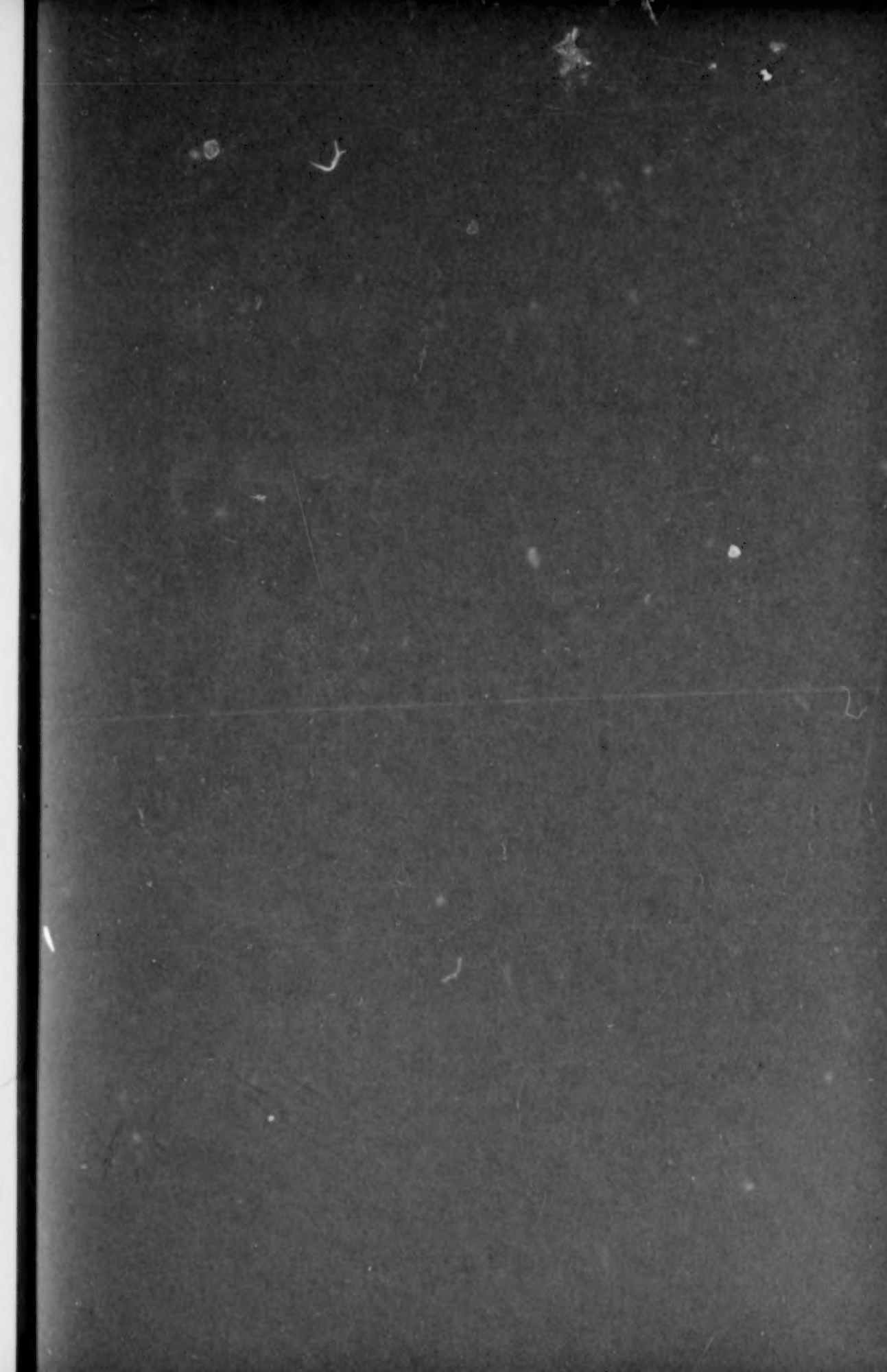
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In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF NEW JERSEY, PLAINTIFF

v.

STATE OF NEW YORK

ON EXCEPTIONS TO THE FINAL AND
SUPPLEMENTAL REPORTS OF THE SPECIAL MASTER

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE
IN PARTIAL OPPOSITION TO EXCEPTIONS**

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the artificially filled portion of Ellis Island is sovereign territory of New York by virtue of the Compact of 1834 (New York Exception No. 1).
2. Whether the artificially filled portion of Ellis Island is sovereign territory of New York under the doctrine of prescription and acquiescence (New York Exception No. 2).
3. Whether the artificially filled portion of Ellis Island is sovereign territory of New York under the doctrine of laches (New York Exception Nos. 3 and 4).
4. Whether New York's jurisdiction over the unfilled portion of Ellis Island extends to the low-water mark of the Island's 1833 coastline (New Jersey Exception No. 1).
5. Whether this Court may modify the sovereign boundary between New York and New Jersey on Ellis Island in response to concerns of practicality and convenience (New Jersey Exception No. 2).



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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 120, Original

STATE OF NEW JERSEY, PLAINTIFF

v.

STATE OF NEW YORK

*ON EXCEPTIONS TO THE FINAL AND
SUPPLEMENTAL REPORTS OF THE SPECIAL MASTER*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN PARTIAL OPPOSITION TO EXCEPTIONS

INTEREST OF THE UNITED STATES

This original action presents a dispute between New Jersey and New York over their sovereign rights respecting Ellis Island. The United States has an interest in this action because Ellis Island is currently part of the Statue of Liberty National Monument. See Proc. of May 11, 1965, No. 3656, 79 Stat. 1490. The United States also has an interest in this action because the suit involves interpretation of an interstate agreement that Congress approved under the Compact Clause, U.S. Const. Art. I, § 10, Cl. 3. See Act of June 28, 1834, ch. 126, 4 Stat. 708. The Court previously invited the Solicitor General to ex-

press the views of the United States in response to New Jersey's motion for leave to file a complaint. *New Jersey v. New York*, 510 U.S. 805 (1993).

STATEMENT

The State of New Jersey brought this original action against the State of New York to obtain a determination whether the artificially filled portion of Ellis Island is within the sovereign territory of New Jersey. New Jersey based its claim on the Compact of 1834, an agreement, ratified by both States, that Congress enacted into law. See Act of June 28, 1834, ch. 126, 4 Stat. 708. This Court granted New Jersey leave to file its complaint, *New Jersey v. New York*, 511 U.S. 1080 (1994), and appointed the Honorable Paul R. Verkuil to serve as the Special Master. 513 U.S. 924 (1994). Special Master Verkuil denied both States' motions for summary judgment, conducted a trial, and prepared a report summarizing his recommendations. On June 16, 1997, this Court received the Final and Supplemental Reports of the Special Master and invited the parties to file exceptions. 117 S. Ct. 2451 (1997).

A. Ellis Island

Ellis Island is a small land form located in the western portion of upper New York Bay. The Master's report describes its rich history, which is interwoven with the Nation's growth.

Henry Hudson made the first recorded notation of the feature now known as Ellis Island, describing its "soft ozie ground," during his 1609 search for the Northwest Passage. The Dutch settlers of "New Netherlands" purchased the Island from Native Americans in 1630. England seized the Dutch possessions in 1664, and King Charles II included them in his 1664 land grant to the Duke of York, which cre-

ated the Colony of New York. During the colonial era, Ellis Island, which was known as one of the Oyster Islands, was occasionally used to hang traitors and pirates. Samuel Ellis obtained possession of the Island in 1785, and it has since born his name. See Final Rep. 4 n.2, 33-34 & n.19.

Following the Revolutionary War and the ratification of the Constitution, the State of New York enacted a statute ceding "jurisdiction" of Ellis Island to the United States, subject to New York's continued right to serve judicial process there. 1800 N.Y. Laws ch. 6. New York later conveyed all of its "right, title and interest" in Ellis Island to the United States "for the purpose of providing for the defence and safety of the city and port" of New York. 1808 N.Y. Laws ch. 51. The United States constructed Fort Gibson on the uplands, which at that time consisted of less than three acres. The United States used Ellis Island for military purposes through most of the nineteenth century. See Final Rep. 8, 40 n.22, Apps. I and J (maps).

In the 1880s, the United States made plans to convert Ellis Island to other uses. The United States obtained New York's cession of "right and title" to and "jurisdiction over" submerged land surrounding Ellis Island. 1880 N.Y. Laws ch. 196. It later placed Ellis Island under the control of the Treasury Department for use as an immigration station. In 1890, the United States began enlarging Ellis Island by filling the surrounding submerged land. In 1904, the United States recognized that New Jersey had a claim of title to that land, and it obtained a deed from New Jersey conveying the property. N.J. Except. Br. App. C. Between 1890 and 1934, the United States filled approximately 24.5 acres surrounding the origi-

nal Ellis Island and built various buildings on the artificial uplands. See Final Rep. 8-9, Apps. F and K.

The United States used Ellis Island as its primary immigration station from 1892 to 1934. During that period of operation, 12 million immigrants passed through the station. Today, as many as 100 million Americans have ancestors who came to America by way of Ellis Island. See Final Rep. 34. In light of its historical significance, President Johnson proclaimed Ellis Island a part of the Statue of Liberty National Monument. See Proc. of May 11, 1965, No. 3656, 79 Stat. 1490. The United States, which continues to hold title to Ellis Island, has restored the immigration station in recognition of its important place in American history. Final Rep. 9, 34.¹

B. The Compact of 1834

The States of New Jersey and New York have disputed their sovereign boundary in the vicinity of Ellis Island since colonial times. Their competing claims originally rested on the terms of a land grant from the Duke of York, proprietor of the Colony of New York, to Lord Berkeley and Sir George Carteret, which created the Colony of New Jersey. The grant included lands west of Long Island and Manhattan Island, "bounded on the east part by the main sea, and part by Hudson's River." Although the Declaration of Independence transformed the Colonies into States, and the ratification of the Constitution brought those States into "a more perfect Union," New York and New Jersey soon found themselves in direct conflict

¹ The United States has not determined the extent to which the federal government exercises legislative jurisdiction over Ellis Island under the Enclave Clause. U.S. Const. Art. I, § 8, Cl. 17. That matter is not at issue in this case.

over the location of their boundary. See Final Rep. 6-7, 34-40.

In 1798, New York granted an exclusive franchise to Robert Livingston to operate steamboats on New York's waters. In connection with that monopoly, New York claimed that the terms of the Duke of York's conveyance preserved all of the Hudson River and New York Bay as New York's sovereign territory. New Jersey responded that the boundary lay at the midpoint of those waterways. In 1807, the States attempted, without success, to negotiate a settlement of the issue. The States then each attempted to exert control over commerce on those waters, precipitating this Court's landmark decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which recognized the United States' power over interstate commerce. See Final Rep. 35-40.

The States attempted again to reach an agreement on their sovereign boundary in 1827, but those negotiations also failed, and New Jersey filed an original action in this Court to obtain a judicial determination of the issue. See *New Jersey v. New York*, 28 U.S. (3 Pet.) 461 (1830); see also 30 U.S. (5 Pet.) 284 (1831); 31 U.S. (6 Pet.) 323 (1832). While that action was pending, the States resumed negotiations and, in 1833, reached an agreement. Congress approved that agreement, which is commonly known as the Compact of 1834, and enacted it into federal law, Act of June 28, 1834, ch. 126, 4 Stat. 708. See Final Rep. 41-44.

Congress described the Compact as an agreement "settling the jurisdiction and territorial limits of the two states." 4 Stat. 709. Article First of the Compact provides:

The boundary line between the two states of New York and New Jersey, from a point in the middle

of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

Ibid. Article Second addresses the status of various islands, including Ellis Island, which lies on the New Jersey side of the Article First boundary. Article Second states:

The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

Ibid. Articles Third through Seventh follow a similar pattern of granting one State a measure of "jurisdiction" in waters on the other State's side of the boundary. *Id.* at 709-711.²

² Article Third grants New York "exclusive jurisdiction," subject to certain exceptions (including New Jersey's "exclusive right of property in and to the land under water"), in portions of the Hudson River and New York Bay. 4 Stat. 709-710. Article Fourth grants New York "exclusive jurisdiction" over "quarantine laws, and laws relating to passengers," in specified waterways on the New Jersey side of the boundary line. *Id.* at 710. Article Fifth, which follows precisely the pattern of Article Third, gives New Jersey "exclusive jurisdiction," subject to certain exceptions, in the sound between New Jersey and Staten Island. *Ibid.* Articles Sixth and Seventh grant each State the right to serve certain types of judicial process on waters within the boundary of the other State. *Id.* at 710-711. The final article, Article Eighth, states that the

C. The Current Litigation

New Jersey sought leave to file this original action to adjudicate its sovereign rights respecting the artificially filled portion of Ellis Island. See Final Rep. 3-4. Relying on the Compact of 1834, New Jersey specifically requested:

That the boundary line be declared to be the former mean high water line of the original natural island, approximately 3 acres in size, so that the original island is thereby declared to be within the territory and jurisdiction of the State of New York, and so that the balance of the island, approximately 24.5 acres in size, and the surrounding waters, are thereby declared to be within the territory and jurisdiction of the State of New Jersey.

N.J. Compl. at 15. New Jersey's complaint was prompted, in part, by a decision of the United States Court of Appeals for the Second Circuit, which ruled that New York had jurisdiction to prescribe tort law on the filled portions of Ellis Island. See *Collins v. Promark Prods., Inc.*, 956 F.2d 383 (1992).³

agreement shall become binding upon approval by the state legislatures and Congress. *Id.* at 711.

³ In *Collins*, a federal employee was injured while using a stump grinder on the filled portion of Ellis Island. He sued the grinder's manufacturer, and the manufacturer impleaded the United States under the Federal Tort Claims Act (FTCA), which imposes liability on the United States if a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The United States moved for summary judgment, arguing that New Jersey's workers compensation law governs the filled portions of Ellis Island and does not permit third-party actions against employers. The district court denied the motion. The court of appeals affirmed, ruling that, under

New York opposed New Jersey's motion for leave to file a complaint, and this Court invited the Solicitor General to express the United States' views. *New Jersey v. New York*, 510 U.S. 805 (1993). The United States suggested that there was no pressing need to decide the question of the States' authority over Ellis Island in light of the United States' current title to, and control over, the small acreage in question. The Court nevertheless granted New Jersey leave to file its complaint. 511 U.S. 1080 (1994). New York filed an answer contending that the Compact of 1834 granted New York "territorial and sovereign jurisdiction" over Ellis Island in its entirety. New York's answer also raised the affirmative defense of prescription and acquiescence. See Final Rep. 13-16.

The Special Master supervised pre-trial proceedings, denied both States' motions for summary judgment, and conducted a trial on the disputed issues of fact. The Master's Final Report sets out his recommended decision. Final Rep. 2-3. The Master resolved the dispute based on four fundamental determinations: (1) Article First of the Compact of 1834 establishes the boundary between New Jersey and New York at the midpoint of the Hudson River and New York Bay (*id.* at 89); (2) Article Second of the Compact of 1834 grants New York jurisdiction over Ellis Island as it existed in 1833, but does not address New York's authority over the portion of the Island that was later created by filling submerged lands (*ibid.*); (3) the artificially filled portion of Ellis Island is sovereign territory of New Jersey under the common law

Article Second of the 1834 Compact, New York law governed the impleader claim. Neither New York nor New Jersey was a party to that action, but both States participated as *amicus curiae*. See Final Rep. 81.

doctrine of avulsion (*id.* at 99); and (4) New York has not sustained its burden of showing that the artificially filled portion of Ellis Island is sovereign territory of New York under the doctrine of prescription and acquiescence (*id.* at 144-145).

The Master additionally concluded that the Court should not decree the States' sovereign boundary on Ellis Island by simply following the contours of Ellis Island as it existed in 1833. Final Rep. 162-167. He recommended that, to achieve "the most practical, convenient, just, and fair boundary line," the Court should recognize New York's sovereign territory as extending over an area of land that approximates the size of the original Island to the low-water mark, but reconstitutes it based on the location of the structures that the United States has restored on the Island. *Id.* at 164-165. The Master's Supplemental Report sets out a precise boundary line based on that approach. New Jersey and New York have filed exceptions to the Master's recommendations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Special Master has prepared a thorough and scholarly analysis of whether New Jersey or New York is entitled to exercise sovereignty over the artificially filled portion of Ellis Island. New York has filed four exceptions, while New Jersey has filed three. We disagree with all four of New York's exceptions. We disagree with New Jersey's first exception, but concur, in important respects, in New Jersey's second exception. We take no position on New Jersey's third exception, which involves a narrow issue of disputed fact.

1. New York contends that the Compact of 1834, which preserves New York's "present jurisdiction" over Ellis Island, grants New York sovereignty over

the subsequently filled area surrounding the original Island. The Master correctly concluded that the 1834 Compact does not address the question whether filling submerged lands surrounding the Island extends New York's "present jurisdiction." He properly resorted to the common law doctrine of accretion and avulsion to resolve that issue. The Master correctly concluded that, because the filling was avulsive, it did not extend New York's sovereignty beyond the original Island.

2. New York next argues that it established prescriptive sovereignty over the filled portion of Ellis Island. The Master found, after a detailed examination of the evidence, that New York had failed to carry its burden of showing that it had asserted dominion over the filled portion with the acquiescence of New Jersey. The United States, which had recognized during the relevant time period that New Jersey had a colorable claim to the filled portion of Ellis Island, agrees with the Master's conclusion. The contrary evidence that New York cites is simply too episodic and inconclusive to provide a basis for divesting New Jersey of its sovereignty over the filled area.

3. New York contends, in its third and fourth exceptions, that the Court should apply the doctrine of laches to preclude New Jersey's claims. The Master correctly rejected that defense. This Court has recognized that, in the case of interstate boundary disputes, the defense of laches is subsumed within the doctrine of prescription and acquiescence. *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991).

4. New Jersey contends that New York's sovereignty over Ellis Island, as it existed in 1833, extended only to the high-water mark. The Master properly considered and rejected that contention. As a general common law principle, a State that holds up-

lands retains sovereign authority over the associated tidelands. See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). New Jersey has put forward no convincing reason to conclude that the States intended the Compact of 1834 to depart from that practice.

5. New Jersey also urges that, once the Court has located the interstate boundary by applying the pertinent principles of law, the Court should not make adjustments to that boundary based on considerations of practicality or convenience. We agree. The Constitution grants this Court original jurisdiction to adjudicate suits between States over the location of interstate boundaries. This Court has never asserted the power to reconfigure a boundary in the manner that the Master recommends. See *Washington v. Oregon*, 211 U.S. 127 (1908).

ARGUMENT

I. THE COMPACT OF 1834 DOES NOT VEST NEW YORK WITH SOVEREIGNTY OVER POST-COMPACT ADDITIONS TO ELLIS ISLAND

New York urges that the Compact of 1834 recognizes New York's sovereignty over all portions of Ellis Island, including the portion that was created, long after the Compact was ratified, by filling adjacent submerged lands. N.Y. Excerpt. Br. 11-21. According to New York, the plain language of the Compact is "sufficient" to secure New York's sovereignty over both the original and the later filled portions of Ellis Island. *Id.* at 11. New York's construction is unpersuasive.

The Master correctly described the terms of the Compact. Article First of the Compact establishes the sovereign boundary between New Jersey and New

York as a continuous line following the midpoint of the waterways that separate their shores. 4 Stat. 709. Those waterways (from north to south) are the Hudson River, New York Bay, the waters between Staten Island and New Jersey, and Raritan Bay. See Final Rep. App. B (map). Articles Second through Seventh of the Compact then set out a series of exceptions allowing one State to exercise specified measures of "jurisdiction" within the boundary of the other State. Article Second expressly preserved New York's "present jurisdiction" over Ellis Island, which lies on the New Jersey side of the boundary. 4 Stat. 709. See *Central R.R. v. Jersey City*, 209 U.S. 473 (1908) (Holmes, J.).⁴

New York contends that, because Article Second does not contain any metes and bounds limitations on the size of Ellis Island, Article Second authorizes New York to exercise "present jurisdiction" over artificially created additions to the Island. N.Y. Except. Br. 11-13. The Master correctly rejected that conten-

⁴ In *Central Railroad*, Jersey City sought to tax privately owned submerged land below the low-water mark on the New Jersey side of New York Bay. The Court held that Article First of the 1834 Compact gave the State of New Jersey sovereignty over the submerged lands in New York Bay to the middle of the Bay and that Jersey City could therefore tax those lands. 209 U.S. at 478. The Court noted that the specific grants of "jurisdiction" in the Articles that followed conferred "something less" than complete sovereignty. *Id.* at 479. The Court specifically observed that Article Second's reference to "present jurisdiction" seemed "on its face simply to be intended to preserve the *status quo ante*, whatever it may be." *Ibid.* As that case demonstrates, there is nothing unusual in one State's agreeing, by interstate compact, to allow another State to exercise limited sovereign powers within its borders. See Charles Warren, *The Supreme Court and Sovereign States* 69-72 & n.73 (1924) (citing other examples).

tion. The contracting States designated "Ellis's Island" as the specific area over which New York was authorized to exercise jurisdiction. 4 Stat. 709. They had no need to include a "metes and bounds" description of that Island unless they wished to describe *something other than* Ellis Island as it then existed. By referring simply to Ellis Island, the States expressed their intention that New York would exercise "present jurisdiction" over that feature as they knew it, subject to the familiar common law doctrines of accretion and avulsion. See Final Rep. 60, 89, 90-92.⁵

New York also argues that the Compact did not need to make express reference to the possibility of future filling around Ellis Island, because the use of fill in New York Harbor was an accepted practice at the time and "extension of Ellis Island by landfill could have been foreseen by the Commissioners who devised the Compact." N.Y. Except. Br. 13-15. The Master examined New York's evidence of the historic practice and concluded that it was "too ambiguous to

⁵ The Master was also correct in rejecting New Jersey's contention that the Compact's reference to "present" jurisdiction categorically limits New York's jurisdiction to Ellis Island's 1833 dimensions. Final Rep. 60-62. As he explained:

It makes more sense to read "present," as New York does and New Jersey does in part, to refer to the fact that Ellis Island was owned and operated by the United States at the time of the 1834 Compact, whereas the other islands were not.

Id. at 62. The Master properly concluded that the Compact is silent on the question of future additions, and the matter should be resolved by reference to the "age-old" common law doctrines of avulsion and accretion. *Ibid.* See *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 717 (1836) (noting that the common law rule of accretion applies to "public" rights).

permit a factual finding that the practice of fill or wharfing-out had been established and thus taken for granted during that time." Final Rep. 92 n.39. Indeed, it seems highly unlikely that the contracting States anticipated and consented, through silence, to filling of the magnitude that took place on Ellis Island. As the Master pointed out, the filled additions have expanded Ellis Island to nine times its original size. *Id.* at 92.

New York's argument is not only contrary to the reasonable construction of the Compact's terms, but it would also lead to absurd results. As the Master pointed out, under New York's construction of the Compact, there is no limit to how far New York's jurisdiction might be extended. "New York theoretically could add to her territory an area as large as Governors Island within New Jersey's sovereign territory." Final Rep. 92. He correctly concluded that, "[i]f such territorial expansion of a small island were contemplated in 1833, some references to it would logically have been set forth in the 1834 Compact." *Ibid.*

II. NEW YORK FAILED TO ESTABLISH THAT THE FILLED PORTIONS OF ELLIS ISLAND ARE WITHIN ITS SOVEREIGN TERRITORY UNDER THE DOCTRINE OF PRESCRIPTION AND ACQUIESCENCE

New York also challenges the Master's application of the common law doctrine of prescription and acquiescence. N.Y. Except. Br. 21-40. New York claims that Ellis Island is within its sovereign territory, irrespective of the Compact of 1834, because "New York has sufficiently demonstrated both its prescriptive acts over Ellis Island and New Jersey's acquiescence therein." *Id.* at 21. The Master rejected that conten-

tion based on an exhaustive examination of New York's evidence. He correctly applied the standard for prescription set forth in *Georgia v. South Carolina*, 497 U.S. 376, 393 (1990), dividing his analysis into four distinct time periods in Ellis Island's history. See Final Rep. 100-103, 106-144.

In the first period, from 1834 to 1890, the Master observed that there was no landfill on Ellis Island over which New York could exercise prescription. Final Rep. 106. In the second period, from 1890 to 1934, he found that the United States exercised almost exclusive control over the Island through its immigration program, *id.* at 106, 110, that New York's intermittent prescriptive acts over the Island were inconclusive, *id.* at 114, and that New Jersey demonstrated its non-acquiescence through, among other things, a 1904 deed transferring its underwater territory around the island to the United States, *id.* at 123. In the third period, from 1934 to 1955, the Master determined that several events, including a continuing controversy among the United States, New York, and New Jersey over employment on Ellis Island, defeated New York's claim of prescription and acquiescence. *Id.* at 132-136. In the final period, from 1955 to the present, the Master found that New Jersey's opposition to New York's jurisdiction was "much too active" (*id.* at 106) to establish New Jersey's acquiescence. *Id.* at 136-142. The Master accordingly concluded that New York had failed to prove either its own prescription over the filled portions of Ellis Island, or New Jersey's acquiescence to those attempts. *Id.* at 144-145.

New York's challenges to the Master's factual findings are unpersuasive when viewed against the Master's detailed analysis. We highlight three

central considerations that support the Master's recommendation.

a. The Master found a number of systemic deficiencies in New York's evidentiary presentation. He noted that New York's basic theory was flawed because New York apparently believed that New Jersey was required to give "formal, direct notice of *her* acts of non-acquiescence to New York." Final Rep. 108-109; see *id.* at 118. The Master recognized that New York may prove prescription and acquiescence despite the United States' essentially complete occupation of Ellis Island, but he emphasized that New York must show prescription over the filled portion. *Id.* at 109-111. He found that much of New York's evidence was inconclusive precisely because it did not distinguish between the original and filled portions of the Island. *Id.* at 113, 115, 116, 117, 118. He specifically noted that New York's attempt to show—through maps, postcards, and other documentation—that the public perceived Ellis Island to be in New York does not resolve the question of prescriptive sovereignty over the filled area. *Id.* at 115-116. See *Virginia v. Tennessee*, 148 U.S. 503, 527 (1893); *Louisiana v. Mississippi*, 202 U.S. 1, 55 (1906).

b. The Master acknowledged that "New York through the City of New York probably had more contact than did New Jersey (or Jersey City) with Ellis Island—particularly with the Main Building on the original Island—during the crucial 1890 to 1934 period." Final Rep. 144. He also pointed out, however, that New York's greater relative contact with Ellis Island does not sustain New York's "burden of showing that she prescribed the filled portion of the Island during the critical eras." *Ibid.* He accurately characterized New York's evidence of prescriptive

acts as "intermittent, often inconclusive and certainly disputed." *Ibid.*

For example, New York presented evidence of interaction between federal officials on Ellis Island and the New York City government. That evidence showed that, in 1897, the United States established an interim federal immigration station in New York City in 1897 after a fire destroyed several buildings on the Island; in the early 1900s, federal officials calculated federal contracts on the basis of New York wage rates; and, in 1915, a federal official invited New York City officials to use several buildings on the Island as homeless shelters. Final Rep. 113-114. The Master correctly observed that the evidence, which "simply describe[s] the general association between New York City and immigration through Ellis Island," does not demonstrate that New York unambiguously asserted sovereignty over the filled portion of Ellis Island. *Id.* at 113.

New York also introduced evidence showing that New York City episodically provided Ellis Island with police and fire services. Final Rep. 114. But as the Master noted, it appears that there was "some involvement by New Jersey in policing the Island as well." *Ibid.* New York presented 23 birth certificates, six marriage certificates, and 22 death certificates as evidence of its responsibility "for keeping records of the vital events that took place on Ellis Island." N.Y. Except. Br. 24. The Master found that small body of vital statistics inconclusive: "New York was unable to prove that the births, marriages, and deaths she documented occurred on the Island, let alone the landfilled portion." Final Rep. 115. New York recites hearsay of numerous marriage ceremonies on Ellis Island, see N.Y. Except. Br. 25, but those

recountings do not indicate where on the Island the ceremonies took place.

The Master's analysis shows that he carefully considered New York's evidence of prescription, but found it insufficient to show that New York had acquired dominion over New Jersey's sovereign territory. His recommendation is sound. This Court should not lightly infer that one State has acquired the territory of another. New York's evidence does not "demonstrate the unequivocal acts of prescription demanded by this Court's jurisprudence." Final Rep. 145; see *California v. Nevada*, 447 U.S. 125, 130-132 (1980); *Arkansas v. Tennessee*, 310 U.S. 563, 567-572 (1940).

c. The Master also concluded that New York had failed to overcome the evidence of New Jersey's assertions of sovereignty over the filled portions of Ellis Island and non-acquiescence in New York's prescriptive acts. Final Rep. 123-144. He recognized that perhaps the most important evidence was New Jersey's 1904 deed granting the United States title over submerged land surrounding the Island. *Id.* at 124.

Soon after the United States began filling the submerged land surrounding Ellis Island, New Jersey requested that the United States recognize its claim of title by securing a deed from New Jersey conveying those lands. The United States agreed to resolve the matter in that manner, and it received a deed from New Jersey on November 30, 1904, conveying the lands in question. Final Rep. 124-126; see N.J. Except. Br. Apps. C, D. New Jersey's express assertion of its claim of sovereign ownership is highly probative in showing that New Jersey did not acquiesce in New York's claim of dominion. See *Michigan v.*

Wisconsin, 270 U.S. 295, 316-319 (1926); *Indiana v. Kentucky*, 136 U.S. 479, 510 (1890).

The Master noted other evidence indicating that both the United States and New Jersey recognized New Jersey's sovereignty over the filled portion of Ellis Island. For example, at the end of the nineteenth century, the Army Corps of Engineers issued maps of the area bearing the legend "Ellis Island, New Jersey." Final Rep. 118-122, App. G. In 1933, the federal government applied for a New Jersey waterfront development permit for the Island; in 1937, the federal government applied for a New Jersey permit to construct a water main for the Island; and, from 1947 to 1949, the Department of Labor applied New Jersey's wage rates to contracts for work on the Island. *Id.* at 123, 134-136. In 1934, at the request of New Jersey officials, a New Jersey congresswoman attempted to secure federal employment for New Jersey workers on the island. *Id.* at 132-135. After 1955, New Jersey actively opposed New York's claims of jurisdiction over the filled portion of the Island. *Id.* at 136-144.⁶

Because the United States occupied Ellis Island, and New York's prescriptive acts respecting the filled portion were intermittent and equivocal, New Jersey often had little reason or occasion to challenge those specific acts. The evidence nevertheless shows that, when New Jersey's sovereign interests were directly threatened, New Jersey consistently asserted its

⁶ From 1904 to 1963, federal officials expressed various opinions on the merits of New Jersey's claim that Ellis Island is part of that State's sovereign territory. While those opinions are neither dispositive nor entirely congruous, they do reflect a consistent view that New Jersey asserted a claim of sovereignty to the filled portions of Ellis Island. See Final Rep. 125, 133-134, 139-141.

authority over the filled portion of Ellis Island. The Master properly concluded that New Jersey's actions were sufficient to defeat New York's claim of acquiescence. In the words of Justice Cardozo: "Acquiescence is not compatible with a century of conflict." Final Rep. 145 (quoting *New Jersey v. Delaware*, 291 U.S. 361, 377 (1934)).

III. NEW YORK'S CLAIMS OF INEQUITABLE DELAY ARE ADEQUATELY ADDRESSED THROUGH THE DOCTRINE OF PRESCRIPTION AND ACQUIESCENCE

New York challenges the Master's decision not to apply the doctrine of laches to this case. New York specifically objects to his conclusion that New York's concerns about New Jersey's delay in filing suit can be addressed by the doctrine of prescription and acquiescence. N.Y. Except. Br. 40-45. This Court addressed the relationship between those doctrines in *Illinois v. Kentucky*, 500 U.S. 380 (1991), and its decision in that case is controlling here. The Court concluded in *Illinois* that Kentucky was not entitled to invoke the doctrine of laches in an interstate boundary dispute, 500 U.S. at 388. It observed that "the laches defense is generally inapplicable against a State." *Ibid.* The Court determined that, in any event, the doctrine of laches is subsumed within the doctrine of prescription and acquiescence, stating:

Although the law governing interstate boundary disputes takes account of the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitations, it does so through the doctrine of prescription and acquiescence, see generally

Georgia v. South Carolina, *supra*, which Kentucky has failed to satisfy.

Ibid. That decision, by its terms, is directly applicable to this case.

New York contends that the question remains open in light of this Court's decision in *Kansas v. Colorado*, 514 U.S. 673 (1995). The Court stated in *Kansas* that it "has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact." *Id.* at 687. The Court made that statement, however, in the context of an interstate water dispute, where there is no equivalent to the doctrine of prescription and acquiescence that "takes account of the broad policy disfavoring the untimely assertion of rights." *Illinois*, 500 U.S. at 388.⁷

Although this case involves the interpretation of the Compact of 1834, it is, at bottom, an interstate boundary dispute. Under this Court's *Illinois* decision, New York, like Kentucky, should be limited to the defense of prescription and acquiescence.

⁷ The United States filed a brief *amicus curiae* in *Kansas* in which it urged that "this Court may take into account traditional equitable principles, such as the doctrine of laches, when resolving an equitable claim by one State against another State in an original action." U.S. Br. at 35, No. 105 Orig. We suggested that "[c]oncepts such as laches or acquiescence are applicable to actions to enforce a compact insofar as enforcement turns on equitable principles." *Id.* at 36. That position reflects our concern that the federal government's operation of interstate water resource projects may be impaired if States invoke their rights to water, and seek retroactive remedies, long after the water has been distributed. Those concerns are not present here.

IV. NEW YORK'S JURISDICTION OVER ELLIS ISLAND EXTENDS TO THE ORIGINAL ISLAND'S LOW-WATER MARK

New Jersey excepts to the Master's determination that New York has jurisdiction over the original Island as it existed in 1833 to the low-water mark. N.J. Except. Br. 28-38. According to New Jersey, "[t]he absence of any reference to low water" in the Compact of 1834 indicates the States' intention "to limit New York's jurisdiction on Ellis Island to the land area above the mean high water mark." *Id.* at 30. New Jersey's contention is incorrect. Article Second of the Compact of 1834 granted New York "present jurisdiction" over Ellis Island, but it did not expressly state whether that jurisdiction extended to the Island's high-water mark or its low-water mark. The Master therefore conducted a careful examination of the history of the Compact's development, beginning with the States' 1807 negotiations, to resolve that issue. See Final Rep. 70-72, 151-155.

As he recounted, New York initially claimed the entire Hudson River to the *high-water mark* of the New Jersey shore. Final Rep. 70. In response, New Jersey submitted that the States' boundary was the middle of the Hudson River and the New York Bay. *Id.* at 71. The States were unable to reach agreement, and the negotiations ended shortly thereafter. *Ibid.* After those negotiations ended, this Court held in *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820), that the boundary established by a river in that case extended to the low-water mark.

In 1827, when the States resumed negotiations, it appears that the *Handly's Lessee* decision may have influenced their negotiation positions. See Final Rep. 154; see also New York City Amicus Br. 17. New Jer-

sey, for example, proposed that "the islands called Bedlow's Island, Ellis' Island, Oyster Island and Robins Reef, *to the low water mark of the same*, be held to be and remain within the exclusive jurisdiction of the state to New-York." Final Rep. 72. Similarly, New York offered New Jersey exclusive jurisdiction over all land on the west shore of the Hudson River "*to the low-water mark.*" *Id.* at 73.

The two States were ultimately unable to reach an agreement in 1827. The Master determined, however, that when the States negotiated the Compact of 1834, they carried forward their understanding that shoreline boundaries should be set at the low-water mark. Final Rep. 153-154. The Master concluded that "both sides seem[ed] to be assuming that the low-water mark, not the high-water mark, would define the respective territorial limits." *Id.* at 154. "The conduct of the parties and the legal assumptions under which they were operating indicate that they intended to have the Island boundary extend to the low-water mark." *Ibid.*

New Jersey contends that the Master erred in "rely[ing] upon the exchange of rejected negotiating points in 1827 as a basis for determining what the States intended." N.J. Except. Br. 29-30. This Court has recognized, however, that when an interstate boundary agreement is being interpreted, the nature and history of the controversy "must be considered." *Vermont v. New Hampshire*, 289 U.S. 593, 605 (1933). That is what the Master did in this case. He properly examined the 1827 negotiations and determined that they revealed how the positions of both States had evolved in the period before the formulation of the Compact. See Final Rep. 70-73, 151-155.

The Master's recommendation is consistent with the general rules governing shoreline boundaries.

This Court has long recognized that the original 13 States possessed title to lands beneath inland navigable waters, including tidelands. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842); see also Joseph Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* (1826). The Court has likewise recognized that shoreline boundaries extend "down to the low water mark." *United States v. California*, 332 U.S. 19, 30 (1947); see *Handly's Lessee*, *supra*. The Master properly concluded that the Compact of 1834 should be read consistently with that understanding and that New York's right of "present jurisdiction" over Ellis Island should accordingly extend to the low-water mark of the 1833 Island.⁸

**V. THE COURT SHOULD DECLINE TO MODIFY
AN INTERSTATE BOUNDARY BASED ON
CONSIDERATIONS OF PRACTICALITY AND
CONVENIENCE**

New Jersey challenges the Master's recommendation that the Court employ a modified boundary line on Ellis Island. Based on his interpretation of the

⁸ New Jersey mistakenly relies on *United States v. Alaska*, 117 S. Ct. 1888 (1997), and *United States v. California*, 382 U.S. 448 (1966) (per curiam), for the proposition that an island includes only those lands above the high-water mark. See N.J. Except. Br. 30-31. Those cases recognize that the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." See Art. 10(1), 15 U.S.T. 1609. That definition does not determine, however, the seaward extent of an island. Rather, the Convention generally defines the "baseline" of a sovereign's land territory, including islands, as the low-water line along the coast. See Arts. 1, 3, 10(2), 15 U.S.T. 1608, 1609.

Compact of 1834 and the doctrine of avulsion, the Master determined that the sovereign boundary between New Jersey and New York on Ellis Island is located at the low-water mark of Ellis Island, as it existed in 1833. Final Rep. 146, 162. He also found that the 1833 boundary was reasonably ascertainable based on existing nineteenth century maps. See *id.* at 155-162. The Master concluded, however, that the use of that boundary "introduces impracticalities and inconveniences," *id.* at 162, and "would create an overly literal status of divided sovereignty that would be neither just nor fair to New York," *id.* at 163. He therefore proposes that the Court adopt a reconfigured boundary. *Id.* at 164-167. The United States submits that the boundary modification that the Master proposes appears to exceed the Court's historic power.

Courts routinely determine boundaries based on judgments that resolve uncertainty over the location of the "true" line. See, e.g., Olin Browder, *The Practical Location of Boundaries*, 56 Mich. L. Rev. 487 (1958). The Master's recommendation rests, however, on a different proposition. He suggests that this Court should modify a reasonably ascertainable boundary to provide "a remedy that is just, fair, and convenient to the parties and the public." Final Rep. 146. His recommendation rests on concerns that a boundary based on the 1833 low-water mark would intersect a number of the historic structures on Ellis Island and would leave "relatively thin strips of New Jersey's sovereign territory between New York and the ferry slip." *Id.* at 162-163. He proposes to solve that problem by reconfiguring the boundary to maintain New York's historic acreage, provide New York with ferry access, and avoid intersecting important historic buildings. *Id.* at 164-166.

The Master's recommendation reflects his conscientious attempt to fashion the best practical remedy, but it also exceeds the historic reach of this Court's original jurisdiction. As this Court has recognized, the foundations of that history were laid before the American Revolution. See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 738-748 (1838); see also *Virginia v. West Virginia*, 246 U.S. 565, 597-600 (1918).

The King of England established the boundaries of the original Colonies by royal prerogative, and he could adjust boundaries as an exercise of that power. *Rhode Island*, 37 U.S. (12 Pet.) at 739. See Hannis Taylor, *Jurisdiction and Procedure of the Supreme Court of the United States* § 52, at 82-83 (1905). Although the King, in council, could draw new boundaries or change existing ones, he could not resolve a boundary dispute if it arose out of compact or agreement between the proprietors of the Colonies. *Rhode Island*, 37 U.S. (12 Pet.) at 739-740; see *Penn v. Lord Baltimore*, 27 Eng. Rep. 1132, 1134 (1750). The King was obligated to refer such disputes to the English courts, where they were determined "in judicature according to the law." *Rhode Island*, 37 U.S. (12 Pet.) at 742.

The Declaration of Independence severed English rule, and the new States soon saw need to create a mechanism for resolving their boundary disputes. See Charles Warren, *The Supreme Court and Sovereign States* 4-5 (1924). On July 12, 1776, John Dickinson presented his draft of the Articles of Confederation, which provided that Congress would have the authority to settle "all Disputes and Differences now subsisting, or that hereafter may arise between two or more Colonies concerning Boundaries, Jurisdictions, or any other Cause whatever." Merrill

Jensen, *The Articles of Confederation* 258 (1970). See Charles Warren, *supra*, at 4-5. The States ultimately adopted an elaborate mechanism, set out in Article IX of the Articles of Confederation, for settling boundary disputes through the selection of a neutral tribunal. See Merrill Jensen, *supra*, at 266-267. That mechanism, however, proved ineffective. See *Virginia*, 246 U.S. at 598-599; Hannis Taylor, *supra*, § 52, at 83; Charles Warren, *supra*, at 12-13; Hampton L. Carson, *The Supreme Court of the United States* 69, 72 (1891).⁹

The States revisited the issue during the Constitutional Convention of 1787. The Committee of Detail's draft provided that the Senate would decide disputes involving "jurisdiction or territory" under a procedure virtually identical to that provided in the Ninth Article of Confederation. 5 *Debates on the Adoption of the Federal Constitution* 376, 379 (J. Elliot ed., reprint 1987) (1888). During subsequent debates, the Framers determined that the creation of the federal judiciary rendered the procedure unnecessary, and they agreed to delete it. *Id.* at 471. They "accepted without question" the principle that Article III should contain an explicit grant of original jurisdiction to determine controversies between States. Max Farrand, *The Framing of the Constitution of the United States* 156 (1913); see also *Virginia*, 246 U.S. at 600; Charles Warren, *supra*, at 31-37.

⁹ The Continental Congress employed an Article IX tribunal in only one instance, to resolve a long-running dispute between Connecticut and Pennsylvania, which had attracted widespread attention and had resulted in open hostilities and bloodshed. See Charles Warren, *supra*, at 5-8; Hampton L. Carson, *supra*, at 67-68.

The Constitution establishes a division of authority respecting boundaries that builds upon the distinction that had existed under English rule. Congress, through its political authority, can establish the boundaries of new States and approve interstate compacts that alter boundaries and settle boundary disputes. U.S. Const. Art. I, § 10, Cl. 3 and Art. IV, § 3. But once the boundaries are described by statute or compact, this Court, as a matter of judicial power, has authority to resolve boundary disputes between the States. U.S. Const. Art. III. Under that division of authority, Congress and the States may take into account "practicality" and "convenience" when deciding where, as a matter of political authority, to draw an interstate boundary. This Court, however, decides a boundary dispute based solely on its interpretation and application of the relevant law.

The Court's decision in *Washington v. Oregon*, 211 U.S. 127 (1908), provides an instructive example. The State of Washington brought an original action to determine its southern boundary with the State of Oregon. The Act of Congress admitting Oregon into the Union provided, *inter alia*, that Oregon's boundary with Washington would be "the middle of the north ship channel of the Columbia River." *Id.* at 131. At that time, the Columbia River had two channels, and the northern channel was considered the better one for navigational purposes. *Ibid.* Over the course of several years, however, the northern channel grew shallow, and the southern channel had "become the one most used." *Id.* at 133. Washington sought a declaration from this Court "that the true boundary line is the varying center or middle of that channel of the river which is best constituted and ordinarily used for the purposes of navigation." *Id.* at 134.

The Court ruled that it lacked authority to change a clearly specified boundary, rejecting Washington's argument that its proposed boundary line was more consistent with the underlying congressional intent. 211 U.S. at 135-136. The Court, in a unanimous opinion, stated:

[W]hen Congress came to provide for the admission of Oregon * * * it provided that the boundary should be the middle of the north channel. The courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel. That remains the boundary, although some other channel may in the course of time become so far superior as to be practically the only channel for vessels going in and out of the river.

Id. at 135. The Court acknowledged that unforeseen circumstances had diminished Washington's access to the Columbia River. It refused, however, to "ignor[e] the action of the Government in prescribing the boundary." *Ibid.* Congress later authorized those States to enter into an interstate compact to modify the boundary, see S.J. Res. 88, 61st Cong., 2d Sess., 36 Stat. 881 (1910), and they ultimately reached agreement on an appropriate line, see Act of July 31, 1958, Pub. L. No. 85-575, 72 Stat. 455; Wash. Rev. Code Ann. §§ 43.58.050 *et seq.* (West 1983).¹⁰

¹⁰ This Court has applied similar reasoning in cases involving interstate compacts. Under the Compact Clause, two States may not enter into an agreement without the express consent of the Congress. Once given, however, "congressional consent transforms an interstate compact within this Clause into a law of the United States." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). As a result, "unless the compact to which Congress has consented is somehow unconstitutional, no court

The *Washington* decision counsels that, once an interstate boundary is established by law, this Court lacks the authority to alter it in response to changed circumstances, even if the alteration would implement an underlying policy that Congress or one of the States might favor. That principle controls the issue here. We accordingly suggest that this Court should sustain New Jersey's exception and leave it to the States to determine, with the concurrence of Congress, whether the boundary established by law—the low-water mark of Ellis Island, as it existed in 1833—should be modified in light of current conditions.

CONCLUSION

The exceptions of the State of New York and exception number one of the State of New Jersey should be overruled. Exception number two of New Jersey should be sustained.

Respectfully submitted.

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SEPTEMBER 1997

may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

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In the
Supreme Court of the United States

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**ON EXCEPTIONS TO THE REPORT OF THE
SPECIAL MASTER**

**REPLY BRIEF OF THE STATE OF NEW JERSEY
IN OPPOSITION TO THE EXCEPTIONS OF
THE STATE OF NEW YORK**

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SUMMARY OF ARGUMENT ¹

New York's claim that the Compact granted it jurisdiction over the entire Ellis Island, regardless of the extent of the Island's expansive growth in the years following the Compact, is not supported by evidence or consistent with legal principles. Under the Compact, New York's jurisdiction is limited to the Island as it existed in 1834. New York additionally cannot establish that it acquired jurisdiction over the filled portions of the Island through prescription and acquiescence. New York has proven neither the exercise of governmental authority by New York nor the silent acceptance of such acts by New Jersey necessary to establish such a claim. Finally, the Court's prior opinions make clear that laches is not applicable to boundary disputes between States. Even if the doctrine were to be applied in this case, New York failed to prove that it was prejudiced by any alleged delay by New Jersey.

ARGUMENT

POINT I

UNDER ARTICLE II OF THE COMPACT, THE LANDFILLED PORTIONS OF ELLIS ISLAND CREATED AFTER THE COMPACT WAS ADOPTED ARE PART OF NEW JERSEY AND SUBJECT TO ITS SOVEREIGNTY AND JURISDICTION.

New York rests its entire claim under the Compact on its assertion that Article II grants New York jurisdiction over the whole of the Island as it exists today. However, as the Special Master correctly found, Article I of the Compact established a permanent interstate boundary at the middle of

¹ The State of New Jersey incorporates herein the Procedural History and Overview of the Special Master's Report and Recommendation set forth in its Brief in Support of Exceptions filed with this Court on July 31, 1997.

the dividing waters between New Jersey and New York, and thus placed Ellis Island and the subaqueous lands surrounding it within New Jersey waters. Article II provides that New York will "retain" its "present jurisdiction" over Ellis Island. The Article further provides that New York will "retain" exclusive jurisdiction over the other islands "lying" in the waters between the States and "now" under New York jurisdiction. Article II of the Compact was intended to preserve the *status quo ante* of 1834. *Central R.R. Co. v. Mayor of Jersey City*, 209 U.S. 473, 479 (1908). Significantly, Article II contains no reference to future improvements or filling. In sharp contrast, Articles III and V explicitly provide that New Jersey and New York shall have jurisdiction over improvements "made and to be made" on their respective shores.

Well-established principles governing the interpretation of interstate Compacts require that the Court interpret Article II in accordance with its plain meaning. *Oklahoma v. New Mexico*, 501 U.S. 221, 245, 247 (1991)(Rehnquist, C.J., concurring and dissenting); *Carchman v. Nash*, 473 U.S. 716, 724-27 (1985); *Texas v. New Mexico*, 462 U.S. 554, 564, 572 (1983). The use of present tense language throughout the Article, coupled with its lack of reference to any future landfilling or improvements, indisputably shows that New York's jurisdiction under the Article never was intended to encompass new land masses or islands created by artificial filling after 1834. Rather, the "Ellis's Island" referenced in the Article was the 2.74-acre "Ellis's Island" that existed in 1834.

When an interstate boundary is established by Compact and approved by Congress, that boundary becomes final and binding, and extinguishes any previous boundary claims. *Virginia v. Tennessee*, 148 U.S. 503, 525, 526 (1893); *Coffee v. Groover*, 123 U.S. 1, 30-31 (1887); *Poole v. Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 210 (1837). The

Court consistently has held that a boundary set by Compact incorporates and refers to the physical conditions that existed when the boundary was adopted, and cannot be based on physical changes that occurred afterwards. *See, e.g., Georgia v. South Carolina*, 497 U.S. 376, 396-98 (1990)(new islands that emerged after boundary was set and which were located within South Carolina's boundary were part of South Carolina, even though boundary agreement gave Georgia sovereignty over "all the islands" in the river); *Ohio v. Kentucky*, 444 U.S. 335 (1980)(interstate boundary was low water line of 1792, not current low water line); *Minnesota v. Wisconsin*, 252 U.S. 273, 279-80 (1920)(main channel, or boundary line, was the channel that existed in 1846, not the channel subsequently created by dredging); *Arkansas v. Tennessee*, 246 U.S. 158, 177 (1918). Accordingly, Article II refers to the Ellis Island of 1834, and under Articles I and II, the landfilled portions of Ellis Island created after 1834 are part of New Jersey and subject to its sovereign governmental power and jurisdiction.

The States' intention underlying the 1834 agreement is not simply reflected in the plain language of the Compact, it is also evidenced by New Jersey's 1829 Complaint in this Court in which New Jersey argued that New York's only claim to the islands arose from adverse possession and that New York's adverse possession had been limited to the fast lands. Thus, to the extent that the 1834 Compact reflects New Jersey's willingness to accede to New York's jurisdictional claim to Ellis Island, New Jersey's concession related solely to the fast land, the land that existed in 1834.

New York nevertheless argues that the States must have contemplated the expansion of Ellis Island after 1834 because, in New York's view, landfilling on both sides of the Hudson River was a commonplace, accepted practice when the Compact was made. New York argues that its "present jurisdiction" under Article II should therefore be interpreted to include the 24 acres of made land created by

the United States by filling submerged lands in New Jersey waters in the years after 1834. However, there is not a shred of evidence in the legislative history of the Compact which supports the notion that the Commissioners who negotiated the 1834 agreement contemplated that New York's jurisdiction over the Island could be enlarged without limitation in New Jersey territory.

Moreover, New York's factual claim that landfilling was widespread in New York Harbor in 1834 and therefore landfilling around the original Island must have been anticipated by the States was appropriately rejected by the Special Master. The record does not support that assertion. In fact, New York's own expert witness, Donald F. Squires, conceded that although there had been some filling of submerged lands on the New York side of the Harbor, as of 1834 there was very little filling on the New Jersey side of the Hudson River. T2851-22 to T2852-10; T2857-18 to T2858-12. Filling of lands along the Jersey shoreline was minor until the railroads reached the area after 1848. *See* D932 at p. 13. Furthermore, the record contains no conclusive evidence that by 1834 any filling had occurred around the original Island. T265-14 to T266-19; T292-9 to T293-13; T313-11 to -20; T336-10 to T338-1; T250-5 to -8, P478, p. 18.

The earliest maps in the record indicate that Ellis Island was about three acres at the beginning of the 19th Century. P382(d). The Island was some 2.74 acres in 1834 and essentially remained that size until large scale filling commenced in 1890. Compare P382(j) and P382(l). Rather than anticipating extensive filling around the original Island,

the Commissioners would more likely have assumed that the size of the Island would remain stable.²

In further support of its contention that Article II allows New York to exercise jurisdiction over the filled portion of the Island, New York disputes the Special Master's finding that Ellis Island was, in fact, at one time three land masses, entirely separated by water. Report at 94-97. New York asserts that Ellis Island is today and has always been one island. However, the evidence fully supports the Special Master's factual finding that the present Island is made up of land area that was at one time three separate and distinct islands. Report at 95.

The United States expanded the original Island after 1890 by filling some eight acres of submerged lands in New Jersey waters. The federal government then built a second island in 1899, and built a third island in 1905 to 1906. These three land areas have long been referred to as Islands Nos. 1, 2, and 3. See Historical Development Map, Report at 14a. Island No. 2 was initially connected to Island No. 1 by a ferry house and covered walkway built on pilings over water. The 1901 photograph of these connecting structures, which is included as Exhibit E in the Special Master's Report, plainly shows that those structures were built on pilings, that there was water under the structures and that the water could pass directly out from under the ferry basin

² New York also relies upon the 1686 Dongan Charter and the 1730 Montgomerie Charter in support of its contention that landfilling around Ellis Island would have been anticipated by the States when the Compact was made in 1834 but there is no evidence that the provisions of either document were relied upon for filling of lands on the Jersey side of the Harbor. Indeed, the evidence also shows that the Montgomerie Charter of 1730 pertaining to New York City did not give the City or anyone else the right to reclaim the submerged lands within the western part of the Hudson River or the submerged lands surrounding Ellis Island. D743; T1594-24 to T1595-8.

between the Islands No. 1 and 2 to the Bay of New York.³ In addition, the record unequivocally shows that Island No. 1 was not connected by fill to Island No. 2 until 1933, and that Islands 2 and 3 were not connected to each other by fill until the 1920's. See P382; P386. Research documents compiled for the federal government by New York's expert, Harlan D. Unrau, are replete with references to Islands Nos. 1, 2 and 3. See D74 and D952. The evidence thus conclusively establishes that the land area presently referred to as Ellis Island is not the same as the "Ellis's Island" referred to in the Compact.

New York further contends that it was granted jurisdiction over the waters of the harbor to promote, as Justice Holmes noted in *Central R.R.*, *supra*, "the interests of commerce and navigation." 209 U.S. at 479. New York insists that this purpose can only be accomplished by interpreting Article II to encompass the islands that existed in 1834, all expansions to those islands, and, apparently, all new islands that emerged after 1834. But this argument, too, lacks any support whatsoever in the legislative history. There is nothing to buttress the claim that New York deemed retention of jurisdiction over Ellis and the other islands essential to the exercise of its limited authority over navigation and commerce on the waters.

As it relates to Ellis Island, this assertion is refuted by the fact that decades before the Compact was agreed to New York sold the Island to the federal government and

³ New York endeavors to controvert what the eye can plainly see by relying on Dr. Squire's entirely speculative assertion that Island No. 1 and Island No. 2 were somehow connected by "timber cribbing" beneath the water. NY's Exceptions Brief at 20. The water purportedly "obscures the solid cribbing." Significantly, Dr. Squires could not point to any evidence in the record to support his theory. The Special Master rightly commented that a picture is worth a thousand words. Report at 96; T2233.

ceded virtually all governmental authority over the Island to the United States. New York certainly did not view ownership or control of the Island to be at all necessary to its jurisdiction over the waters of the Harbor, a fact further underscored by the purported transfer and cession of jurisdiction over the adjoining submerged lands in 1880. New York's own actions completely undermine its claim that control of the Island and surrounding fill were a necessary ingredient to its authority to promote "the interests of commerce and navigation." *Id.*

New York's argument in this regard is merely a variation of the assertion it advanced in 1870, when it claimed that its Article III power was the equivalent of sovereignty on the New Jersey side of the boundary line. That assertion was rejected by New York's highest court in *People v. Central R.R.*, 42 N.Y. 283, *appeal dismissed*, 79 U.S. (12 Wall.) 455 (1870). The New Jersey courts also rejected the contention. *See Central R.R. v. Mayor of Jersey City*, 56 A. 239 (N.J. Sup. Ct. 1903), *aff'd*, 61 A. 1118 (N.J. 1905). In 1908, this Court reached the same conclusion in *Central R.R.*, *supra*. The courts uniformly have agreed that New York's Article III jurisdiction cannot override the sovereign boundary in Article I. The same conclusion must obtain with regard to New York's jurisdiction over Ellis Island under Article II.

POINT II

THE BOUNDARY ESTABLISHED IN ARTICLE I IS A SOVEREIGN BOUNDARY, NOT A MERE ALLOCATION OF PRIVATE PROPERTY RIGHTS.

Before the Special Master, New York asserted that the boundary established in Article I was not a sovereign boundary within the waters between New York and New Jersey, but simply gave New Jersey property rights in the submerged lands. New York apparently has abandoned this

particular argument in its exceptions, and now primarily relies on Article II to support its contention that the landfilled portions of Ellis Island created after 1834 are within its territory. However, *amici* argue that under the Compact "jurisdiction" means "sovereignty," and that the Compact only gave New Jersey property rights in the waters surrounding Ellis Island, not governmental authority.⁴

The contention that New Jersey only has property rights in the submerged lands on its side of the boundary in the dividing waters was rejected by the Court in *Central R.R.*, *supra*. As Justice Holmes pointed out for the Court:

It appears to us plain on the face of the agreement that the dominant fact is the establishment of the boundary line. The boundary line is the line of sovereignty, and the establishment of it is not satisfied, but is contradicted, by the suggestion that the agreement simply gives the ownership of the land under water on the New Jersey side to that state as a private owner of land lying within the state of New York. On the contrary, the provision as to exclusive right of property in the compact between states is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits, which was declared to be one purpose of the agreement, and is not to be confined to the assertion and recognition of a private claim [209 U.S. at 478].

⁴ The Special Master rejected this assertion and New York has not taken exception to that finding. For this reason, the Court should decline to entertain argument by *amici* on the issue.

As Justice Holmes noted in his opinion, the Court's interpretation of the agreement was based on the uniform interpretation of the agreement reflected in the decisions of the highest courts of New Jersey and New York. *Id.* at 479.

New York has accepted the decision of its highest court since it was rendered in 1870. Indeed, in 1880, when the boundary Commissioners from both States formally drew the boundary that had been agreed to in 1834, they did so based on the 1870 decision of the New York Court of Appeals. P329. In 1921, New York and New Jersey supplemented the Compact of 1834 by establishing the New York Port Authority, and agreed once again that they shared a common, sovereign boundary at the middle of the Hudson River and Bay of New York. P408, p. 39, p. 70; P407, p. 38; P409, p. 13; P407, Part II, p. 44. Like the Compact of 1834, this supplement was approved by Congress. 42 Stat. 174 (1921).

It is simply too late in the day for New York and its *amici* to relitigate the question of whether the boundary line is a line of sovereignty or merely a line dividing the property interests of the States in the land under the waters of New York Harbor. While New York may continue to believe that Justice Holmes was "wrong" in the *Central R.R.* decision, its long standing acceptance of that decision, and the prior ruling of its own Court of Appeals, effectively forecloses New York and its *amici* from relitigating the issue in this Court. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) ("With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by

definition, indispensable." (O'Connor, Kennedy and Souter, JJ.).⁵

POINT III

SPECULATIVE FEARS THAT DUAL JURISDICTION OVER ELLIS ISLAND WILL BE IMPRACTICABLE HAVE NO FACTUAL FOUNDATION AND DO NOT PROVIDE A BASIS FOR ALTERING THE INTERSTATE BOUNDARY ESTABLISHED BY THE STATES AND APPROVED BY CONGRESS IN 1834.

New York *amicus* Trust for Historic Preservation posits that dual jurisdiction over Ellis Island will create insurmountable practical difficulties and impede the preservation of Ellis Island as a historic landmark. Similarly, New York *amici* New York Landmarks Conservancy, Preservation League of New York State, and Historic Districts Council urge the Court to hold that under Article III, New York should be granted sole jurisdiction over historic preservation. This Court should not base its decision on the speculative, unsubstantiated and exaggerated fears of *amici*, and should reject the *amici*'s interpretation of Article III.⁶

⁵ New York was a party to the 1870 decision of its highest court and therefore the decision is binding on it. In addition, both States have relied on the decision for the past 127 years. Elementary notions of *res judicata*, collateral estoppel and *stare decisis* preclude New York from disinterring its argument of 1870 in 1997. See *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984); *Kremer v. Chemical Constr. Co.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

⁶ In large part, the Historic Trust premises its concerns on the purely hypothetical assumption that at some indeterminate time the federal government may relinquish its control over Ellis Island. The Island is part of the Statue of Liberty National Monument operated by the National Park Service. The notion that the federal government will sell or dispose of the

Amici speculate that recognizing New Jersey's sovereignty over the filled lands will create insurmountable difficulties, embroil this Court in ongoing controversy, and potentially impede historic preservation. *Amici* further suggest that the historic preservation laws of New York are superior to New Jersey's laws and that New Jersey has a lesser interest in preservation than New York. Thus, while paying lip-service to the notion that the Compact is to be enforced as written, *amici* urge this Court to base its decision on considerations which are both totally unfounded and completely irrelevant.

Ellis Island is owned and controlled by the United States, which has consulted both New York and New Jersey with respect to preservation matters. There is no evidence that this approach has impeded preservation in any way.⁷ And, more importantly, in prior litigation, the United States took the position that both New Jersey and New York had jurisdiction over Ellis Island. *Collins v. Promark Prods., Inc.*, 956 F.2d 383 (2d Cir. 1992). Thus, the prospect of dual jurisdiction has not been of concern to the governmental entity which is responsible for preserving and administering the Island on a day-to-day basis.

Similarly, there is no evidence that New Jersey and New York will be unable to cope with shared jurisdiction. New York and New Jersey already share jurisdiction over the waters between the States under Articles III, IV and V of the Compact. The record contains no indication whatsoever that this situation has created any of the insurmountable difficulties which *amici* hypothesize may occur.

Island is pure fantasy.

⁷ The Administration Building and the Kitchen and Laundry Building have been renovated after consultation with *both* States. The federal government was not faced with *any* dispute by the States in the preservation of those buildings.

Over the years, New York and New Jersey have been able to harmoniously address issues of joint interest. For example, since 1921 the States have collaborated on transportation and other port-related projects through the Port Authority of New York and New Jersey, a bistate entity. As another example, both States are members of the Delaware River Basin Commission, which was established in 1961. See N.J. Stat. Ann. §§ 32:11D-1, *et seq.* (West 1990). See also, Andrew C. Revkin, *Harbor to Be Dredged, but Much Tainted Mud Lacks Home*, N.Y. Times, May 12, 1997 at p. B1. *Amici's* groundless fears of endless disputes regarding Ellis Island are sheer speculation and hyperbole.

Amici's additional contentions that New York's preservation laws are superior to New Jersey's laws and that New York has better experience in preservation are patently offensive as well as irrelevant. As a threshold matter, New Jersey takes issue with *amici's* view that New York's historic preservation laws are in some sense better than comparable laws in New Jersey. Indeed, the National Trust for Historic Preservation correctly notes that Jersey City has a comprehensive landmarks law. New Jersey state law also bars the State or its local government units from undertaking projects that will "damage or destroy" a structure on the Register of Historic Places. N.J. Stat. Ann. §13:1B-15.131 (West 1991). New Jersey's Waterfront Development Act comprehensively regulates projects on property fronting upon navigable waters of the State. See N.J. Stat. Ann. §12:5-1, *et seq.* (West 1979).⁸ Taken together, New Jersey law and

⁸ The State's regulations implementing that Act, N.J. Admin. Code tit. 7 §7-1, *et seq.* (1996) and N.J. Admin. Code tit. 7 §7E-1, *et seq.* (1996), provide that within the New York Bay, Hudson River area, the territorial area subject to State regulation includes any tidal waterway and all lands lying thereunder, up to the mean high water line, as well as an adjacent uplands area. N.J. Admin. Code tit. 7 §7-2.3(a)(3) (1996). In addition, the State's implementing regulations include historic sites as areas requiring special protection, and discourage development that

local regulation provide strong measures for the protection of landmark structures at Ellis Island.

In any event, this Court has never resolved an interstate boundary dispute or interpreted an interstate Compact by comparing the laws of the disputing States, and deciding which laws it prefers. Similarly, this Court has never resolved such a dispute by examining each States' experience in a particular area, and determining which State possesses better qualifications. Rather, this Court has based its decisions on the terms agreed to by the States. The Court must enforce the Compact as written. *Texas v. New Mexico*, 482 U.S. 124 (1987); *Arizona v. California*, 373 U.S. 546, 565 (1963).

Finally, the New York Landmarks *amici* maintain that the Court should declare that New York has "at the very least" certain police power jurisdiction over all of the waters of the River and the Bay, and such jurisdiction extends to the filled portion of Ellis Island. The Landmarks *amici* argue that this power is synonymous with the "police power" of State and local governments and would include the power to regulate the preservation of landmark structures.

This is merely another attempt to extend New York's sovereignty to the New Jersey shore. What the Landmarks *amici* call "police power" is the full range of sovereign power under some other name. New York's jurisdiction under Article III over the waters of the River and New York Bay does *not* encompass such a range of governmental powers.

detracts from, encroaches upon, damages, or destroys the value of historic resources. See N.J. Admin. Code tit. 7 §7E-3.36 (1996).

The nature and extent of New York's jurisdiction over the waters under Article III were defined as early as 1870 by the New York Court of Appeals:

It was to be a police jurisdiction of and over all vessels, ships, boats or craft of every kind that did or might float upon the surface of said waters, and over all the elements and agents or instruments of commerce, while the same were afloat in or upon the waters of said bay and river for quarantine and health purposes, and to secure the observance of all the rules and regulations for the protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York, and preserve thereupon the public peace. [*Central R.R.*, *supra*, 42 N.Y. at 299-300.]

See also, *Central R.R.*, *supra*, 209 U.S. at 479 (holding that New York's police power over the waters "was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article 1"); *Central R.R.*, *supra*, 56 A. at 245 (holding that "the jurisdiction that was conceded to New York over the land and waters within the territorial limits of New Jersey was not governmental").

New York's jurisdiction does not extend to all police powers that might be exercised by a State or local government. What is more, preservation of historic structures is not the sort of regulation that pertains to the interests of commerce and navigation. New York's jurisdiction applies in the waterways. Once the submerged lands around the original Island were filled, there was no longer any basis upon which New York could exercise jurisdiction over navigation and commerce. Article III

therefore provides no basis whatsoever for the exercise by New York of jurisdiction over the filled portions of Ellis Island.

POINT IV

THE EVIDENCE OF NEW JERSEY'S REFUSAL TO ACQUIESCE IN NEW YORK'S PURPORTED ASSERTION OF GOVERNMENTAL DOMINION OVER THE FILLED LANDS IN THE PERIOD AFTER 1955, STANDING ALONE, FORECLOSES NEW YORK'S EFFORT TO APPROPRIATE NEW JERSEY'S TERRITORY.

New York argues that regardless of how the Compact is interpreted, the Court should find that New York's jurisdiction extends to the whole of the present Island by application of the doctrine of prescription and acquiescence. New York focuses its argument entirely on the period from 1890 through 1955, and contends that during this time New York exercised sufficient dominion over the filled lands and that New Jersey acquiesced in New York's prescription of the whole of the Island.

In limiting its argument to the period from 1890 to 1955, New York ignores the overwhelming evidence of New Jersey's non-acquiescence in the years after 1955, and raises no exception to the Master's finding that during this period "New Jersey [was] much too active in opposition to New York's jurisdiction for New York to carry her burden on acquiescence," Report at 106. Instead, New York simply insists that by 1955, whatever claim New Jersey may have had to the filled portions of the Island was extinguished. New York's exception should be overruled because the Special Master's determination that New Jersey's non-acquiescence in New York's purported acts of prescription in the period after 1955 was "beyond cavil" is supported by overwhelming evidence in the record. Report at 12.

In July 1955, when the federal government was considering the sale of Ellis Island, the Commissioner of New Jersey's Department of Conservation and Economic Development wrote to the Regional Director of the General Services Administration ("GSA"), stating that Ellis Island was within New Jersey's jurisdiction. P97, P98, P99, P100, P133. In August 1955, the Jersey City Municipal Council adopted a resolution making the same assertion and urging support for a proposal by James F. Murray, a member of the New Jersey Senate, that the Island be converted to a public recreation area and ethnic museum. P347. At that time, the New Jersey Senate unanimously passed a resolution stating that Ellis Island was within New Jersey. 1955 Minutes of the New Jersey Senate 1031 (August 15, 1955). Additionally, New Jersey Representative T. James Tumulty stated during a debate on the floor of the House of Representatives that, "I am not going to prolong the discussion, but Jersey City claims that Ellis Island, in particular, is within the confines of Jersey City." *Congressional Record*, July 30, 1955, at 12387. The Regional Director of the GSA took note of the claims raised by New Jersey officials. P107.

The assertions of New Jersey's jurisdictional claim to Ellis Island continued, and these actions were well publicized. In January 1956, twenty-five state and county officials from New Jersey undertook an inspection of Ellis Island to reaffirm New Jersey's claim. The inspection was reported in the press. See P108 (N.Y. Times, January 5, 1956; Newark Evening News, January 5, 1956). Representative Irwin D. Davidson of New York commented on New Jersey's claim to jurisdiction over the Island in remarks printed in the *Congressional Record* on March 7, 1956. P109.

The New York Times also reported on the federal government's plans to dispose of the Island on March 14, 1956 and stated that New Jersey had "always contested"

New York's claim to jurisdiction. This report also made mention of the January 4, 1956 inspection tour by the New Jersey officials. P110. In addition, *Business Week* reported on Ellis Island in its September 29, 1956 issue, stating that the Island's potential sale presented the question of jurisdiction between the two States. P111.

Additional actions taken by New Jersey officials in this period further underscore that the question of jurisdiction over Ellis Island was a live controversy. On January 2, 1958, New Jersey State Senator Murray sent a telegram to United States Senators H. Alexander Smith and Clifford P. Case, and Representatives Alfred D. Simiensi and Vincent J. Dellay, all from New Jersey. P113. State Senator Murray asserted that Jersey City had jurisdiction over Ellis Island. See P114 (*The New York Times*, January 3, 1958). Senator Case sent his copy to the Administrator of the GSA who replied stating that the question of whether the property would be subject to New Jersey taxes after sale was a question that had to be resolved between the State and the purchaser. P116.

In June 1959, Governor Robert B. Meyner of New Jersey wrote to a resident of New York concerning Ellis Island and Bedloe's (or Liberty) Island. P123. A copy of this letter was sent to and received by Governor Nelson A. Rockefeller of New York. P487, ¶59; T1291-23 to T1292-24 and T1262-12 to -16. In the letter, New Jersey's Governor stated that the question of jurisdiction over the two islands had "never been settled," and there was speculation whether the islands are in New Jersey or New York. Governor Meyner stated further that in view of the proposed sale of Ellis Island by the federal government, it may be necessary "to decide once and for all whether Bedloe's and Ellis Islands are New Jersey or New York territory." P123.

The issue of jurisdiction over Ellis Island also arose during Congressional hearings on the federal government's

decision to dispose of the Island. New Jersey officials forcefully asserted the State's jurisdictional claims to the Island. See Comments of Representative Dominick V. Daniels of New Jersey, P143, p. 119 (stating that there was an immediate need "to determine in which State and municipality the island lies"); Meyer Pesin, Jersey City Corporation Counsel P143, p. 123 (noting the "legal complication of jurisdictional sovereignty over Ellis Island"); Alvin E. Gershen, Development Advisor for Jersey City, P143, p. 129 (suggesting that the Governors of New York and New Jersey resolve the terms of the jurisdictional location of Ellis Island).

New York officials testifying before Congress also recognized New Jersey's jurisdictional claims. United States Senator Kenneth B. Keating of New York noted the existence of the dispute over jurisdiction and submitted a memorandum he had received from the Library of Congress on the issue. P143, p. 64. At the hearing on December 6, 1962, Senator Keating further stated that "one of the first problems which will arise will be to determine whether Ellis Island actually lies within the confines of New York or New Jersey. I am sure that our colleagues from New Jersey will contend that it is a part of New Jersey." P143. See also Senator Keating, P143, p. 97 ("it may be that a further compact will be necessary here in order to insure that the purchaser does get clear title . . ."). New York City Mayor Robert Wagner also testified concerning the open question of jurisdiction over the Island. In testimony before a congressional subcommittee he stated that, "I think the question of jurisdiction could be ironed out by a meeting of the minds, if there would be an agreement on the purpose to which the island would be put." P143, p. 250.

In 1963, Jersey City officials continued to assert that the municipality would have jurisdiction over Ellis Island in the event of its sale by the federal government. Mayor Thomas J. Gangemi insisted that Jersey City would have a

say in the development of the Island and on September 5, 1963, Jersey City enacted an ordinance that would control such development. P157. Mayor Gangemi also stated that Ellis Island would be taxed by Jersey City once it was sold to a private owner. In fact, Ellis Island had been on the tax rolls of the city since at least 1940.⁹

On February 11, 1963, the Office of General Counsel of the GSA rendered an opinion by Henry Pike entitled, "Ellis Island, Its Legal Status." P144. The opinion, which the Special Master found to be "highly probative", Report at 140, concluded that the United States had title to the original Ellis Island and the acreage created by the filling of the surrounding underwater lands. The opinion also concluded that New York had jurisdiction over the original Island, and New Jersey had jurisdiction over the part of the Island built on the underwater lands. The opinion stated:

the artificial filling in around the original island, about 3 acres in size, did not operate to change the sovereignty over the filled-in area as sometimes occurs in the case of accretion or erosion. The filled-in area remains, for purpose of applying the provisions of the 1833 compact, as if it were 'land under water' lying west of the middle of the bay and river, which under Article Third

⁹ New York's claim that the evidence of Ellis Island's inclusion on New Jersey tax maps was a "well-kept secret" is entirely specious. The tax records of Jersey City and Hudson County are public documents available for review by any interested party. These documents are no more "secret" than any of the public documents relied upon by New York in support of its claimed acts of prescription.

has been consistently held to be part of New Jersey. [P144, p. 3-4].¹⁰

The February 11, 1963 opinion essentially confirmed what United States Attorney General Moody had determined in 1904: the underwater lands around the original Ellis Island were subject to New Jersey's sovereignty and jurisdiction. Significantly, the federal government has adhered to the conclusions reached in the GSA's opinion. In June 1968, the National Park Service prepared a preliminary master plan for the use of Ellis Island. This document concluded that the original three-acre Island was within New York and that the remaining land was "part of the State of New Jersey and under her sovereignty" P166, p. 13.

Shortly thereafter, Congressman (and later New York City Mayor) John V. Lindsay introduced a bill concerning the future use of the Island. As the Special Master noted, in Representative Lindsay's supporting statement "he recognized that the twenty-four acres of fill on Ellis Island 'were never New York property, but as subaqueous territory, pertained to the jurisdiction of New Jersey.'" Report at 138-139, quoting from P154.

A multi-volume analysis of the conditions on the Island issued by the National Park Service in December 1980 reiterated the same point. P170. (The original Island is part of New York, the 24 acres created by landfill and the surrounding waters "are part of the state of New Jersey.") *See also*, Letter of Undersecretary of the Department of Interior Joseph Simmons, III, to Senator Bill Bradley of New

¹⁰ In the opinion, Pike suggested in conclusory fashion that reference in the Compact to "land under water" refers to land below the low water mark. Yet Pike clearly indicated that New York's jurisdiction was confined to the original island which was about three acres. If New York's jurisdiction was so limited, it was limited to lands above the mean high water line, not the low water line.

Jersey concerning employment opportunities for New Jersey workers on the Statue of Liberty restoration project. ("We are aware . . . that the majority of Ellis Island is in the State of New Jersey due to landfill not being covered by the 1833 Treaty.") P171, P172.

In January 1984, the National Park Service completed a form to nominate the Immigration Station on Ellis Island for listing on the National Register of Historic Places. Harlan D. Unrau, New York's expert, signed the form. Under the section of the document entitled, "Location," both New York and New Jersey were listed. In the section that called for "Geographical data," the form stated, "List all States and Counties for Properties Overlapping State or County Boundaries." The Park Service wrote on the form that Ellis Island was geographically within both New York State, New York County, and New Jersey, Hudson County. D74, *Historic Resource Study*, *supra*, pp. 1344, 1350. Notably, the titles to Unrau's two Ellis Island studies both indicate that Ellis Island is part of the Statue of Liberty National Monument which is stated to be in "New York-New Jersey." *Id.*; *Historic Structure Report*, *supra*. Those studies are official publications of the National Park Service.

Unchallenged pronouncements by the federal government concerning the boundaries between States are significant to the determination of whether a boundary has changed through prescription and acquiescence. In *Michigan v. Wisconsin*, 270 U.S. 295 (1926), the Court made clear the importance of a boundary interpretation by the United States and a State's failure to object thereto. In that case, Michigan was found to have lost its claim to disputed land that the federal government determined to belong to Wisconsin. As the Court explained:

the line as claimed by Wisconsin has been, from the time of the Burt survey, accepted as the true boundary by the United States, and,

its surveys, plats, and maps, sales and other acts in respect of the public lands, continuously and consistently recognized, with the knowledge of Michigan and without protest on her part. [*Id.*, 270 U.S. at 307].

Similarly, in deciding a boundary challenge in *Louisiana v. Mississippi*, 202 U.S. 1 (1906), the Court gave considerable weight to determinations by the United States of which State had sovereignty over the disputed land. The Court noted that "[t]he General Land Office of the United States, in all of the maps it has caused to be made of Louisiana and Mississippi, has been consistent in its recognition of the ownership by Louisiana of the disputed" parcel. *Id.*, 202 U.S. at 57.

By 1986, a New Jersey Representative even went so far as to seek a judicial determination of the State's interest in the Island. New Jersey's sovereignty over the filled portions of the Island was the subject of a complaint filed in a New Jersey court by a member of the State's congressional delegation. Although the court determined that it lacked jurisdiction over the dispute, New Jersey, as a defendant, clearly expressed its claim over the filled portions of the Island in the action against New York. *See Guarini v. New York*, 521 A.2d 1362 (N.J. Super. Ct. Chan. Div.), *aff'd*, 521 A.2d 1294 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 484 U.S. 817 (1987).

In addition, in 1992 New Jersey appeared as *amicus curiae* asserting its sovereignty over the filled portions of Ellis Island in *Collins*, *supra*. In that case, the position asserted by the United States was wholly in accord with the February 11, 1963 GSA opinion. The question squarely presented in that case was whether New Jersey law applied to a controversy which arose from an accident that occurred on the portion of the islands created by artificial filling. The federal government maintained that under the Compact of

1834, the filled land was in New Jersey and subject to its jurisdiction.

On January 8, 1993, New Jersey's Attorney General wrote to the Attorney General of New York to reassert New Jersey's claim of jurisdiction over the filled portions of Ellis Island. Although the letter did not result in a resolution of the boundary dispute, New York was again put on notice of New Jersey's territorial claim.

All of the aforementioned evidence establishes beyond dispute that New Jersey had never acquiesced in any purported acts or prescription by New York. Any conceivable doubt on that score would be laid to rest by the 1986 Memorandum of Understanding executed by the Governors of both States. That agreement explicitly recognized New Jersey's right to share the tax revenue collected by *both* States on the Island and conclusively establishes that New Jersey had not acquiesced in any claim by New York to jurisdiction over the filled land.

Following initiation of *Guarini, supra*, New Jersey Governor Thomas H. Kean and New York Governor Mario M. Cuomo executed a Memorandum of Understanding in which both agreed that the two States would share tax revenue collected by both States on the Island. The Governors promised to use their best efforts to have legislation enacted in their respective States dividing tax revenue attributable to the Island. The agreement was executed on June 23, 1986. New Jersey enacted implementing legislation in 1987, N.J. Stat. Ann. §32:32-1, *et seq.* (West 1990). New York has not enacted a law to carry out the agreement.

Without question, when executing the Memorandum, New York recognized that New Jersey had never acquiesced in New York's purported acts of prescription over the filled portions of the Island. It defies logic for New York to claim

that New Jersey had relinquished its jurisdiction over the Island prior to 1955 in light of New York's admission more than thirty years later that New Jersey was entitled to a portion of the tax revenue collected on the Island. There is no explanation for New York's agreement to divide tax revenue from the Island other than New York's indisputable admission that New Jersey had *not* been divested of its jurisdiction over the filled portions of the Island.

An exercise of taxing power is one of the "primary indicia" of a State's jurisdiction. *Illinois v. Kentucky*, 500 U.S. 380, 385 (1991). This Court has explained that any "well-authenticated instance of an effort on the part of [State] authorities to tax property located" on disputed land is significant to the determination of prescription and acquiescence. *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933). In light of its admission in the Memorandum of Understanding, New York cannot convincingly argue that New Jersey's sovereignty over the filled land was lost through prescription and acquiescence prior to 1955.

POINT V

NEW YORK'S CESSIONS OF JURISDICTION IN 1800 AND 1880 PRECLUDE NEW YORK FROM EXERCISING THE RANGE OF GOVERNMENTAL POWERS NECESSARY TO ESTABLISH PRESCRIPTION.

The federal government's pervasive control over Ellis Island following the 1834 Compact left New York without the requisite power to exercise the dominion and control necessary to establish prescription over the filled lands. Not only did New York cede its jurisdiction over Ellis Island to the federal government on two occasions, the United States also maintained a far-reaching presence on the Island for more than a century, controlling the day-to-day operation of every facet of the facilities located there. In these

circumstances, New York had no opportunity to prescribe sovereignty over New Jersey's territory in any meaningful fashion.

It is well-settled that such transfers of jurisdiction vest the federal government with exclusive authority over the ceded area and results in a complete dilution of State control. A cessation of jurisdiction by a State when transferring title to land to the United States results in the federal government becoming "the only authority operating within the ceded area." *Macomber v. Bose*, 401 F.2d 545, 546 (9th Cir. 1968)(citing *Collings v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938)). "When the United States acquires title to lands, which are purchased by the consent of the legislature of the state within which they are situated ... the Federal jurisdiction is exclusive of all state authority." *United States v. Unzeuta*, 281 U.S. 138, 142 (1930). While a State may reserve the right to serve civil and criminal process upon land transferred to the United States, such a limited exclusion does not affect the exclusive federal jurisdiction that vests over the transferred land. See e.g., *United States v. State Tax Comm'n*, 412 U.S. 363, 371-372 (1973). Thus, all controlling legal precedents indicate that the United States had exclusive jurisdiction over the lands ceded to it by New York, that State's reservation of the right to effect civil and criminal process notwithstanding.

New York's expansive cessions of jurisdiction to the federal government stand in sharp contrast to the circumstances presented in *Arkansas v. Tennessee*, 310 U.S. 563, 571 (1940), in which Tennessee was found to have prescribed jurisdiction over land owned by the federal government. Nothing in the opinion of the Court in that case suggests that Tennessee had ceded its jurisdiction over the disputed land to the United States. Nor is there any indication in this Court's holding that the federal government operated a facility on the land or was responsible for the day-to-day maintenance and control of the property. To the

contrary, the record suggests that individuals resided on the federally owned property, paid land taxes to Tennessee and attended Tennessee schools. *Id.* 310 U.S. at 567. New York, on the other hand, transferred its authority and control over Ellis Island to the federal government, which maintained an extensive presence on the Island.

Certainly, in light of the federal government's exclusive control of the filled portions of Ellis Island, any purported acts of prescription by New York were equivocal at best and not material enough to put New Jersey on notice of New York's attempt to usurp sovereignty or to constitute prescriptive acts sufficient to justify a transfer of sovereignty over the disputed land.

POINT VI

NEW YORK'S EVIDENCE OF PRESCRIPTIVE ACTS IN THE PERIOD OF 1890 TO 1955 FAILS TO ESTABLISH THAT NEW YORK EXERCISED DOMINION AND SOVEREIGNTY OVER THE FILLED LANDS FOR A SUFFICIENTLY LONG PERIOD.

In order to establish its claim of prescription and acquiescence New York must prove, by a preponderance of evidence, both "a long and continuous possession of, and assertion of sovereignty over" the disputed land, and a lengthy acquiescence by New Jersey in New York's purported acts of possession and control. *Illinois, supra*, 500 U.S. at 384. Only a "long acquiescence in the possession of territory under a claim of right and in the exercise of dominion and sovereignty over it, is conclusive of ... rightful authority." *Oklahoma v. Texas*, 272 U.S. 21, 47 (1926). The Special Master correctly determined that New York's evidence failed "to demonstrate the unequivocal acts of prescription demanded by this Court's jurisprudence." Report at 145.

New York's claims of prescription must be examined in light of New York's undisputed jurisdiction over the portion of Ellis Island that existed at the time of the 1834 Compact. Because New Jersey does not challenge New York's jurisdiction on the "original" Island, any evidence of New York's acts of prescription over that land are irrelevant to a claim of sovereignty to the portions created by fill subsequent to 1834. Thus, the Special Master was right to examine carefully New York's evidence of prescription to determine if any proof exists that New York asserted control over the disputed portions of the Island.

In addition, as the Special Master correctly pointed out in his Report, the dominant fact regarding Ellis Island in the relevant prescriptive periods is the federal government's ownership and pervasive control of the whole of Ellis Island. In the face of that dominant reality, any of the sporadic and episodic acts which New York now claims as evidence of prescription cannot be seen as having provided New Jersey with notice of any genuine or credible effort by New York to appropriate New Jersey territory by prescription.¹¹

¹¹ Nor can New York claim that its exercise of jurisdiction over the original Island translates into acts of prescription over Islands No. 2 and 3. New York mistakenly relies on the holding in *Michigan, supra*, for the proposition that it had "color of title" to Islands Nos. 2 and 3, and, therefore, exercised dominion over all three Islands by virtue of its exercise of jurisdiction over the original Island. In *Michigan*, Wisconsin was found to have exercised jurisdiction over a series of islands that had been "surveyed and platted as belonging to Wisconsin" by the United States government. *Id.*, 270 U.S. at 312. Although Wisconsin had actually exercised jurisdiction over all but a few of the islands, several had not been subject to that State's prescriptive acts. However, because Wisconsin was operating pursuant to the federal government's declaration that the entire series of the islands belonged to Wisconsin, the State was deemed to have exercised jurisdiction over those islands which had not been subject to specific acts of prescription. *Id.*, 270 U.S. at 313-314. New York, on the other hand, never had the benefit of a federal declaration that it had jurisdiction over Islands Nos. 2 and 3. To the contrary, the federal

- 1) **New York failed to prove a consistent and long-standing policy recording vital statistics for births, deaths and marriages on the filled portions of Ellis Island.**

New York failed to establish a consistent, long-standing practice of recording births and deaths on the filled portions of Ellis Island. New York produced only twenty-two death certificates for all of the decades that that State claims to have prescribed jurisdiction over the filled portions of the Island. All but one of those records are from a three-month period in a single year: 1924. Yet, in that year, some 105 individuals are reported to have died on Ellis Island. *See* D74 at 638. New York's evidence also identifies that there were 267 deaths in 1908 and their expert's testified that there were probably thousands more from 1890 to 1954. T2718-5 to T2722-9. Yet, New York has produced only a smattering of death certificates from its records. INS Historian Marian Smith, New Jersey's witness, could not find any regulation or policy of the State or City, or the federal government, that would support a finding that Ellis Island deaths were routinely recorded in New York. D1-22; T3941-19 to T3942-20.

New York also produced only twenty-three birth certificates and seventeen of these certificates are for births occurring prior to 1897, when a fire leveled the wooden buildings on Ellis Island. This fire destroyed the original hospital complex as well, the bulk of which was located on the original Island, along with the Hospital Administration Building which was entirely within the confines of the original Island. T3919-11 to T3934-15 (discussing location

declaration that it had jurisdiction over Islands Nos. 2 and 3. To the contrary, the federal government has consistently held the opinion that the portions of Ellis Island created by fill are subject to New Jersey's sovereignty. Therefore, New York lacked "color of title" to Islands Nos. 2 and 3, and cannot claim that its prescriptive acts over a portion of Island No. 1 should be interpreted to be acts relating to the two newer Islands.

of buildings prior to the 1897 fire); *see also* P522-P526. If New York issued seventeen birth certificates for births on the portion of the Island over which it had jurisdiction, this is not evidence of prescription over the filled lands. All New York could provide were six birth certificates for Ellis Island after 1897, three of which do not list the place of birth on the Island. As INS Historian Smith testified, there was no proof that the federal government had any policy of recording all Ellis Island births in New York. T3920-1 to -21; T1423-14 to -20.¹²

Similarly, New York's evidence regarding the recording of marriages was totally deficient. New York produced only six marriage certificates. Two of those certificates indicate that the marriage took place on Manhattan Island, not Ellis Island. The remaining four marriage certificates do not indicate where the marriages took place. D46-49. Furthermore, since, as INS Historian Smith testified, the recorded marriages were of immigrants who had not technically landed for immigration purposes, their certificates merely identify the administrative address of the Ellis Island immigration station as a residence. T1356-18 to T1364-13 citing P464-P469. Although New York claims that "hundreds and hundreds of weddings" took place on the Island, there is absolutely no evidence of whether those marriages occurred on the original Island or filled lands, and no evidence of which State, if any, issued marriage certificates for those ceremonies. T1356-18 to

¹² New York comments that two of the birth certificates refer to the Ellis Island hospital as the place of birth. NY Brief at 24. New York adds that three birth certificates refer to the place of birth as Ellis Island and then suggests that it is reasonable to assume that the births occurred in the hospital on the filled land. New York cannot appropriate New Jersey land with such assumptions. It either proves an act of prescription on New Jersey territory or it does not. There is no basis for any assumption as to where those three births occurred, and the remaining two New York birth certificates are a slender reed upon which to claim prescription.

T1358-14; T2702-5 to -18; T2705-3 to -5; T2701-6 to T2718-2. On the other hand, there is considerable evidence in the record suggesting that marriages of immigrants did *not* take place on the Island. Immigrants were taken to Manhattan to be married. Report at 115.

2) New York did not prescribe the tax laws for the filled lands.

There is no evidence that New York levied or collected any taxes on Ellis Island for the period from 1890 through 1991. The record shows that New York did not levy or collect taxes attributable to activities on the filled lands until six years ago, hardly a sufficient period to constitute prescription and after execution of the 1986 Memorandum of Understanding in which New York's Governor explicitly recognized New Jersey's authority to collect taxes associated with Ellis Island.

Without question, when executing the Memorandum of Understanding, New York recognized New Jersey's authority to collect taxes related to Ellis Island. In light of that admission, New York cannot rely upon tax collection activity in the subsequent years as evidence of prescription, particularly when the Memorandum contemplated a sharing of tax revenue. Thus, any evidence of tax collections after the execution of the Memorandum has no bearing on New York's prescription claim.

3) New York did not enforce its civil or criminal laws on the filled portions of the Island.

Contrary to New York's assertions, there is no credible evidence that New York enforced its civil or criminal law with regard to any actions on Ellis Island. This point was essentially conceded by Harlan D. Unrau, New York's expert. He stated that he had no evidence that New York's laws governed activities on the Island. T3608-7 to

-25. New York was asked in discovery to produce evidence of a civil or criminal complaint of New York or New York City with respect to unlawful activities on Ellis Island. It produced nothing and essentially admitted that in response to a demand for admissions. See NY Response to Admission, No. 82.

4) New York did not provide police or fire protection on the Island.

New York police did not patrol the Island and there is no documentary proof that the New York Harbor Police did anything other than patrol the waters around the Island. The only proof offered by New York relates to very limited assistance rendered by its police to the National Park Service, along with the Jersey City police, to provide some measure of protection of the Island from vandalism or theft in the 1970's when the Island was essentially abandoned. T2595-4 to T2614-2; T3950-23 to T3961-10; T2797-22 to T2802-9, citing D50; T2616-10 to T2619-22; T2770-1 to T2782-1, citing D50. NY Response to Request for Admissions, No. 82-84. There has never been a New York police presence on the Island.

Having reviewed the evidence cited by New York concerning policing of Ellis Island, INS Historian Marian Smith stated flatly, "I have yet to see any evidence of the New York City or State police on the island exercising any of their powers even though we know the immigration law allows for the admittance to make arrests. They may have, but we haven't seen any evidence of it. At least I haven't." See T3950-23 to T3961-10, specifically, T3955-6 to -10; see also T2770-1 to T2782-1 citing D50-51 (re-direct) and compare T2797-22 to T2802-9 citing D50-51 (re-cross).

There is also no evidence of the regular provision of fire protection services by New York. The evidence is clearly to the contrary: the federal government provided its

own fire protection apparatus. Again, New York's expert conceded this point. T3686-1 to -10; T26142 to T2616-9; T3682-19 to T3686-11 (discussing the only two fires when New York firefighters may have been called). Although New York points to assistance rendered by New York in the 1916 fire that resulted from the Black Tom explosion in New Jersey, this was an extraordinary event and the rendering of emergency assistance was unremarkable.

- 5) **New York did not prescribe the health or building codes for the Island, it did not mandate rates of wages to be paid, nor did New York's laws apply to workers' compensation claims.**

There is also no evidence supporting New York's contention that New York State and New York City building or health codes applied to activities on Ellis Island, and there is certainly no evidence that New York State or New York City enforced state or local laws there. Indeed, a specification that was issued by the federal government in 1900 explicitly stated that the New York City codes and regulations did not apply to federal construction activities. D775 at p.10. In addition, a specification issued in the 1930's showed that the contractors were not required to comply with local building regulations for construction work within the lot lines of the government properties. D805, p. 3, ¶20. In fact, New York admitted in response to a formal request from New Jersey that "it has produced no documents to support a conclusion that any governmental authority organized pursuant to the laws of New York ever enforced its building codes or ordinances on Ellis Island at any time after the acquisition of Ellis Island by the federal government" New York Response to Request for Admission No. 74.

To the extent the federal government did follow local building regulations, it did not do so out of any legal compulsion, but rather, merely by choice. T1378-13 to

T1381-14 citing D775 at 10, and D426-428. Thus, the federal government's decision to follow New York State or New York City building codes for a particular project is clearly not an act of sovereignty by New York and cannot be given any weight in the prescription analysis.¹³

- 6) **New York offered no evidence that any resident of Ellis Island voted in a New York election and its registration of Ellis Island voters is insufficient to establish prescription over the filled lands.**

New York's evidence regarding voting also fails to establish its prescription claim. Contrary to New York's assertions, there is no evidence that any Ellis Island resident actually voted in a New York election. New York produced voting registers for only ten out of the more than 100 years during which New York claims to have prescribed jurisdiction over the filled portions of the Island. D52-58 and D953-956. While New York suggests that this evidence is a representative sampling of its voting registration records, the record contains no evidence regarding the ninety or more years not covered by the evidence, and no inference can be drawn that evidence of voter registration exists for those years.

¹³ New York also maintains that the federal government's decision to base prevailing wage rates on wages paid in New York is an act of prescription. But, the federal government used New Jersey wage rates as well. Thus, the evidence on this point is equivocal. In addition, New York relies upon its evidence that New York law governed workers' compensation claims for workers at Ellis Island. It presented evidence of one such claim but that claim was presented at a time when the States had no authority to entertain claims for workers on federal projects. See *Murray v. Joe Gerrick & Co.*, 291 U.S. 315, 318 (1934). Indeed, it was not until 1936 that Congress permitted the application of state workers' compensation laws to workers injured on federal property. See 40 U.S.C. §290.

In addition, after 1954, no one lived on the Island and no one lives on the Island today. Thus, for the last 43 years, not one individual has claimed to be qualified to vote in a New York election by reason of residency on the filled portions of Ellis Island.

An examination of the voting district maps prepared by the New York City Board of Elections further undermines New York's arguments. On each of these maps, the size and shape of Ellis Island does not reflect the fill added after 1834. The oval shape that appears on the maps is the same shape of the original Island. D957-965; New York Response to Request for Admission No. 13. The maps clearly do *not* show an intent to include the filled portions of the Island within a New York voting district.

Another indication that the City Board of Elections did not consider the filled portions of Ellis Island to be part of the defined voting districts is the fact that each voting map also depicts Oyster Island, an island which New York expert Donald F. Squires identifies as having been dredged out of existence as early as 1900. The inclusion within the voting district of a land area that ceased to exist sometime prior to 1900 strongly indicates that the Ellis Island that was depicted on all of the voting district maps was the Island as it existed before the filling of submerged lands. T2724-14 to T2733-7 citing D932 at p.9.¹⁴ This conclusion is confirmed by the fact that the earliest election district statute referred to by New York dates from 1882, prior to any significant fill on the Island. Certainly, the New York Legislature could not have intended to refer to the filled portions of the Island in

¹⁴ In fact, New York statutes for the establishment of Senate and Assembly districts list Ellis Island in tandem with the "dredged away" Oyster Island in 1916, 1917, and 1943. See 1916 N.Y. Laws 373; 1917 N.Y. Laws 798; 1943 N.Y. Laws 359. The reference to Oyster Island was not deleted from New York's statutes until 1953. See 1953 N.Y. Laws 893.

that statute. To the extent that subsequent legislation incorporated the terms of the 1882 law, the filled portions of Ellis Island were not included in any New York election district created by the later statutes.

Notably, registrants who identified themselves as living on the filled areas of the Island may not have been legally qualified to vote under New York law. The New York City Board of Elections derives its authority to establish voting districts under state law. New York's statutes establishing voting districts merely refer to Governor's, Bedloe's and Ellis Islands, or simply to Ellis Island. See NY Brief at 23. The New York State Constitution makes similar reference to the islands with respect to State Senate districts. *Id.* There is no explicit reference suggesting the inclusion in those districts of the filled areas of Ellis Island.¹⁵

- 7) **The federal government did not uniformly "believe" that the whole of Ellis Island was part of New York.**

New York also observes that "[t]here is no question that all three branches of the federal government believed that Ellis Island was in New York." NY Brief at 27. The evidence of record does not support New York's contentions.

¹⁵ New York's census districts conformed to New York's election districts. See e.g. 1892 N.Y. Laws 5, §3; 1905 N.Y. Laws 83, §2. Therefore, the filled lands were not properly within the census district. Federal census districts were drawn based on Congressional districts. The laws establishing those districts did not specifically reference the filled lands. See e.g. 1911 N.Y. Laws 890; 1944 N.Y. Laws 726. There was no reference to Ellis Island in 1951 N.Y. Laws 839 or 1970 N.Y. Laws 5. Furthermore, although the 1960 and 1970 federal census counts inhabitants at Ellis Island, no one was living there in those years.

In support of its argument, New York states that the INS "at all times ... regarded Ellis Island as part of New York." New York's argument relies heavily on letterhead used by the federal agency. *Id.* New York's contention concerning what the INS "believed" is undermined by the plain fact that there was one post office for all of Ellis Island and that the uncontested historical evidence places the post office on the original Island, which explains fully any letterhead designation referring to Ellis Island, New York. T3948-22 to T3950-22 citing P531; T1410-8 to T1411-10. Subsequent actions in 1933 by INS Port Commissioner Edward Corsi in an application to New Jersey for a Waterfront Development Permit, and a later application to New Jersey for a water main construction permit in 1937, underscores the lack of merit in New York's claims. INS Historian Marian Smith testified that the agency acknowledged both the historic sovereignty of New York over the original Island and New Jersey's sovereignty over the filled lands. *See* P488-P490. Within ten years of the INS transfer of the Island, that view was echoed by the Government Services Administration in a formal report entitled "Ellis Island, Its Legal Status." P487 ¶71 citing P144.

- 8) **There was no evidence that the public generally perceived Ellis Island to be part of New York.**

Lastly, the Special Master was also correct in concluding that New York's evidence of public perception was decidedly unpersuasive. New York introduced a series of maps, post cards, letterheads, and other documents with the description "Ellis Island, New York" in an effort to establish that the public perceives Ellis Island to be located in that State. Although public perception can be relevant with respect to a claim of prescription and acquiescence, such evidence is of dubious value with respect to a boundary set by Compact. As this Court explained, public perception of the location of a boundary line "cannot affect the potency

and conclusiveness of [a] compact between . . . states by which [a] line was established" *Virginia v. Tennessee*, 148 U.S. 503, 527 (1893).

Moreover, public perception can be established only through evidence of greater clarity than that introduced by New York. The Special Master correctly concluded that New York failed to establish that the public perception concerns the filled portion of the Island, as opposed to the original lands over which New York has jurisdiction. It would be perfectly consistent with New Jersey's sovereignty over the filled portions of the Island for post cards and letterheads to read Ellis Island, New York, as a portion of the Island has been New York's jurisdiction after execution of the 1834 Compact. The same is true of New York's unsupported allegation that the immigrants arriving on Ellis Island believed that they were in New York. Most, if not all, immigrants arriving at Ellis Island did, in fact, pass through the Main Building, the bulk of which is located on the original Island in New York. Thus, their perception that they were in New York, if such a perception did exist, is not at all contrary to New Jersey's sovereign interest in the filled portions of the Island.

POINT VII

NEW JERSEY DID NOT ACQUIESCE IN NEW YORK'S ISOLATED PURPORTED ACTS OF PRESCRIPTION DURING THE PERIOD FROM 1890 TO 1955.

Although there has been little opportunity for either New Jersey or New York to assert governmental authority over Ellis Island in light of the federal government's presence there, New Jersey asserted its sovereign authority over its territory as soon as the federal government began to fill New Jersey's land.

New York takes exception to the Special Master's finding that the 1904 deed from New Jersey to the United States for the submerged lands around the original Island was a sovereign act. New York endeavors to treat that deed as merely a relinquishment of New Jersey's property interest. The ownership by New Jersey of that land was reflective, as Justice Holmes stated in *Central R.R.*, of New Jersey's ultimate sovereign rights. As the Special Master commented, New Jersey's actions to preserve its property rights were sovereign acts. And the sale of the land was made by New Jersey under laws intended to regulate New Jersey's interest in its tidal lands. 1869 N.J. Laws 383; N.J. Stat. Ann. §12:3-4 (West 1979).

New Jersey asserted its interest in the underwater lands surrounding Ellis Island when faced with unauthorized filling by the federal government. P487 ¶20 citing P405; P490 ¶13 citing P383(a); T1364-15 to T1367-14. That resulted in formal recognition by United States Attorney General Moody of New Jersey's sovereign interests. The federal government consequently purchased the lands designated as now and formerly below mean high water surrounding the original Island in 1904. P487 ¶23 citing P338, P351 at pp.4-5; T1448-1 to T1453-16; T886-6 to -17; T944-1 to T956-9. The deed was recorded in Hudson County, New Jersey, and identified the lands as in the "New York Bay in the County of Hudson and State of New Jersey." P487 ¶26 citing P7; T695-12 to T706-4; T711-5 to T715-2 citing P7. The purchase was reported in a page one story of *The New York Times* on July 19, 1904. P487, ¶25 citing P5.

New York also challenges the significance of the federal New York Harbor Line Board maps -- entitled "Pierhead and Bulkhead Lines for Ellis Island, New Jersey, New York Harbor[,] as recommended by the New York Harbor Line Board" -- as "erroneous," a "misnomer," and a "mapmaker's error" that was "[not] worth the trouble of

changing even if someone had noticed it," due to the "irrelevance of state boundaries to the task of establishing harbor lines" NY Brief at 31-33. New York maintains that the maps were "not published" and that the signature of Secretary of War Elihu Root, a prominent New Yorker and eventually an elected official of that State, was of "uncertain authenticity" and significance. *Id.* These contentions fall wide of the mark.

The United States Secretary of War and members of the New York Harbor Line Board, from 1890 through 1915, as part of their delegated responsibilities, prepared, approved and signed each Harbor Line map. P487 ¶27 citing P330(1) through (9), P387, P398; P386; *see* Appendix F, New Jersey's Brief in Support of Exceptions. These were published maps, adopted by the Harbor Line Board which conducted public meetings, some of which were attended by New York officials.¹⁶ P487 ¶¶21, 22. It is incontrovertible that Secretary of War Elihu Root signed the 1901 map identifying Ellis Island, New Jersey. New York has produced no competent evidence to support its position that Secretary Root's signature evidences his "probable indifference to the error," or that he was derelict in his duties as Secretary of War, which required the review and approval of such lines by statute. Both prior and subsequent maps identifying Ellis Island, New Jersey were approved by

¹⁶ Additionally, records of the New York Harbor Line Board document the receipt of a letter dated June 13, 1900 from the New York City Department of Docks and Ferries, which acknowledges the letter's contents as follows: "receipt of invitation to the Mayor of New York City to attend Harbor Line Board meeting on extension of harbor lines in vicinity of Ellis and Bedloes Islands, and states that as the matter refers to extension of harbor lines in State of New Jersey, the New York Dock Dept. is not concerned in the matter." P487 ¶21 citing P386.

the individuals who held the office of Secretary of War at the time of the maps' publication.¹⁷

New York's arguments are equally unavailing in its criticism of the Special Master's observations concerning the Port Authority amendment to the Compact in 1921. The Special Master concluded that the amendment's silence on the issue of Ellis Island was "a tacit recognition of federal hegemony over the Island" because "both States had the opportunity to discuss any and all issues of State activity in and around New York Harbor." Report at 128-29. He concluded that this silence "also serves as evidence of New Jersey's non-acquiescence." *Id.* at 128. Equally as significant is the conclusion that New York's silence was tacit acceptance of New Jersey's sovereignty over the filled lands as well as the lands west of the boundary in the Bay of New York, when viewed in context of preceding and concurrent events: namely, the public demands by the New Jersey Board of Riparian Commissioners that New Jersey's sovereign interest be recognized by the federal government, the public recognition of New Jersey's sovereign interest by the Attorney General in 1904 and the resulting purchase and recording of the deed in that same year; the decision of this Court in *Central R.R.* respecting the interpretation of the Compact, and the publication of New York Harbor Line Board maps identifying the lands as "Ellis Island, New Jersey" from 1890 to 1915.

¹⁷ New York is also without evidentiary support for its theory that the Harbor Line Board was somehow not up to the task of modifying title blocks of maps. In 1915, the title blocks for the maps were redrafted, and reflected the same designation of "Ellis Island, New Jersey." P384. Moreover, even a cursory examination of the maps shows that the harbor lines around Ellis Island were frequently changed, indicating that alteration of the maps was undertaken by the federal government without any change to the designation of the Island as located in New Jersey.

In addition, Ellis Island was and continues to be identified on the tax rolls of Hudson County, New Jersey, as tax exempt government property. NY Brief at 34. This is not, as New York maintains, "a well-kept secret, unknown not only to the United States and the State of New York but . . . to the State of New Jersey itself." NY Brief at 34. Hudson County's tax records were and continue to be public records, freely available to New York if it had cared to take an interest. New York also insists that an assertion by a local government in New Jersey of its power to tax is not an example of non-acquiescence by New Jersey. But the point is not well taken. New Jersey's local governments only exercise power conferred upon them by the State. *Becker v. Adams*, 181 A.2d 349 (N.J. 1962). If Hudson County believed that Ellis Island was part of New York it would not have included the Island on its tax rolls. In *Central R.R.*, this Court held that New Jersey had the power to tax property on its side of the boundary line, including lands beneath the dividing waters. Hudson County's actions were in accord with that recognized sovereignty.¹⁸

New York also disputes the Special Master's observations and conclusions respecting events in 1933 and 1937 concerning the application for permits for waterfront development and for the construction of a water main at Ellis Island. To support its criticism, New York relies upon unsupported speculation in an attempt to undermine what is obvious about the events; *i.e.*, the federal government complied with the statutory and regulatory requirements of New Jersey. NY Brief at 34-35.

The evidence shows that in 1933-1934, the federal government constructed a new ferry house on the narrow

¹⁸ Both Hudson County and Jersey City participated at various stages in this matter as *amici*. Both entities have submitted letters to the Court supporting New Jersey's exceptions and joining in New Jersey's requests for relief.

strip of land adjoining Island No. 1 and Island No. 2, and filled a rectangular stretch of land behind Island No. 2, the ferry house and a portion of Island No. 1. The United States Bureau of Immigration and Naturalization sought a Waterfront Development Permit issued by the New Jersey Board of Commerce and Navigation. The application for the New Jersey permit was signed by Port Commissioner Corsi. P487, ¶28 citing P10, P11 and N.J. Stat. Ann. §§12:15-1, *et seq.* (West 1979); T1368-5 to T1368-11. New York makes the argument that the federal government was "simply seeking a permit from New Jersey for work on New Jersey's subaqueous lands." NY Brief at 35. But that work was on the very territory New York now claims is within its jurisdiction.

Moreover, in 1937, federal officials applied for and received a permit from the New Jersey Board of Commerce and Navigation allowing construction and installation of a water main from Jersey City, New Jersey, to Ellis Island. In its difficulty in securing an easement from the Jersey Central Railroad, whose property the water main would have to cross, the Justice Department drafted a complaint for filing in the Federal District Court of New Jersey. T1368-12 to T1370-17 citing D470-492 (Bates 1666-1699); T1413-17 to T1418-22 citing D485 (Bates 1688). Thus, the federal government recognized the need to comply with New Jersey law and it further recognized that New Jersey's federal court would have jurisdiction if there was a need to commence a lawsuit.

New York also claims that actions by Representative Mary T. Norton of New Jersey to secure employment from New Jerseyans on Ellis Island construction projects should not be considered evidence of New Jersey's non-acquiescence. Here again, New York's arguments must be rejected. This was surely not an example of a member of Congress seeking work for New Jerseyans on a project in New York City. Representative Norton was of the view that

Ellis Island was part of New Jersey and that her constituents should be employed there.

The federal government acknowledged New Jersey's sovereign right to seek an apportionment of New Jersey residents as laborers for Ellis Island projects. Organized labor unions for New Jersey's workers joined Representative Norton in arguing that Ellis Island was within New Jersey, and United States Senator Kean of New Jersey sought resolution of this issue through the appointment of New Jersey laborers. P487, ¶¶30-44 citing P12-P59. As the Special Master concluded, these were unequivocal assertions of sovereignty and are strong evidence of non-acquiescence on the part of New Jersey because "New Jersey was basing her claims to jobs for her citizens on her sovereignty over the filled portion of Ellis Island" Report at 132.¹⁹

New York's argument that a duly elected United States Representative does not speak for the State which she represents is difficult to take seriously. Apparently, New York attempts to belittle Representative Norton because she was allied with the Mayor of the city that she represented in Congress. However, Mary Norton was a prominent official by virtue of her position as a United States Representative. The fact that she was associated with a politically powerful Mayor had absolutely no bearing on her authority as a member of Congress asserting the rights of her constituents.

The Court has made clear that in determining whether acquiescence existed it is "concerned not only with what [a State's] officers have done, but with what they have said, as well." *Illinois, supra*, 500 U.S. at 386. Any "official act" or "expression" of "any official" is significant to a State's

¹⁹ While New York workers were ultimately employed on the Island because the general contractor did not have a permit to operate in New Jersey, this does not negate the fact that New Jerseyans asserted the State's claim to job opportunities on the Island.

claim of sovereignty. *Massachusetts v. New York*, 271 U.S. 65, 95 (1926). Statements by public officials are of "no little interest" when evaluating a State's active preservation of its sovereignty. *Ohio v. Kentucky*, 444 U.S. 335, 340 (1980). Representative Norton's assertions of New Jersey's sovereign rights must be accorded significant weight.²⁰

POINT VIII

LACHES IS NOT APPLICABLE TO BOUNDARY DISPUTES BETWEEN STATES. ANY INEQUITIES RESULTING FROM A DELAY IN PRESERVING SOVEREIGNTY ARE ADDRESSED THROUGH PRESCRIPTION AND ACQUIESCENCE.

This Court's decisions clearly indicate that laches is not applicable to boundary disputes between States. "[T]he

²⁰ The Special Master correctly rejected New York's claim that it was not "on notice" of New Jersey's assertions of sovereignty over the filled portions of Ellis Island. The Special Master noted that "New Jersey, as sovereign, legally does not need to exercise prescriptive acts over her own territory. Rather, she has to counter New York's prescriptive acts of which she has notice by not acquiescing in those acts." Report at 118. Prescription and acquiescence is akin to adverse possession and incorporates the concept that the party against whom the doctrine is sought to be applied must be on notice of the encroaching State's acts of prescription. *Georgia, supra*, 497 U.S. at 393. Thus, it is New York that must prove that New Jersey was on notice of New York's purported acts of sovereignty over the filled portions of the Island and not the other way around. New York failed to meet this burden.

New York's burden of establishing notice is made more difficult by the fact that New York retains jurisdiction over the original Island. Any of the acts that New York claims constitute prescription could reasonably be interpreted by New Jersey to relate to New York's undisputed jurisdiction over the Island as it existed in 1834. Thus, it would not be unusual for New Jersey to interpret isolated exercises of governmental authority by New York as benign.

laches defense is generally inapplicable against a State." *Illinois, supra*, 500 U.S. at 388. "Although the law governing interstate boundary disputes takes account of the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitations, it does so through the doctrine of prescription and acquiescence" *Id.* Any equitable considerations that arise from inaction on the part of a State in a boundary dispute are addressed through the application of prescription and acquiescence.

The Special Master incorrectly concluded that the Court's holding in *Kansas v. Colorado*, 514 U.S. 673 (1995), left open the possibility that laches could apply to boundary disputes, where the boundary is established by compact. While the holding in *Kansas* suggests that laches might apply to disputes between States concerning interstate agreements, that opinion contains no suggestion that the Court has abandoned application of the doctrine of prescription and acquiescence in favor of the doctrine of laches when deciding boundary disputes merely because a boundary is established through compact.

The issue in *Kansas, supra*, was whether Colorado had violated an interstate agreement concerning water rights to the Arkansas River. The boundary between those two States was not in question. When examining the question of delay on the part of Kansas the Court opined that it had "yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact." *Id.*, 514 U.S. at 687 (emphasis added). That this observation was limited to the possibility of applying laches to non-boundary disputes is made plain by this Court's subsequent citation to its holding in *Illinois* that laches is generally inapplicable "in the context of an interstate boundary dispute." *Id.*; see also *Block v. North Dakota*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting) ("[t]he common

law has long accepted the principle [that] neither laches nor statutes of limitations will bar the sovereign.")

While interpretation of certain provisions of the 1834 Compact are at issue in this case, the core dispute between the parties is over their common boundary on Ellis Island. The holding in *Kansas*, therefore, is inapplicable to the extent that the Court infers that laches may be applicable in certain original jurisdiction cases concerning the enforcement of interstate agreements.

As explained above, New York failed to introduce convincing evidence that New Jersey acquiesced in any purported acts of sovereignty by New York over the filled portions of the Island. To permit New York to assert the equitable doctrine of laches after that State has utterly failed to establish the elements of prescription and acquiescence would completely subvert that doctrine. New York seeks to expand its jurisdiction without having to establish that it ever undertook prescriptive acts over the disputed land. It would be entirely inequitable to divest New Jersey of its sovereignty over the filled portions of the Island without any showing at all by New York that that State had exercised governmental control over the disputed land. To do so would render meaningless the long-standing precedents of this Court applying prescription and acquiescence to boundary disputes.²¹

²¹ The Special Master rightly concluded that a State is not required to preserve its claim of sovereignty over disputed land through the initiation of legal proceedings in this Court against the encroaching sovereign. In fact, in a long line of decisions dating back to the very founding of this nation numerous factors apart from the pursuit of judicial relief have been considered by this Court to be indicative of a State's non-acquiescence in another State's exercise of dominion over disputed territory. As this Court plainly stated in *Michigan, supra*, an expression of sovereignty by a State can be made in any "practical way," including, but not limited to, a request for judicial relief. 270 U.S. at 316.

Even if this Court were to apply laches to this matter, there is no evidence in the record of prejudice to New York to justify application of the doctrine to its benefit. "The defense of laches 'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Kansas, supra*, 514 U.S. at 687 (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)).

New York's claim of prejudice is grounded on nothing more than baseless speculation that evidence supporting that State's position was destroyed prior to the time that this action was commenced by New Jersey. Unable to produce any proof that reliable evidence favoring New York's position was made unavailable because of delay, that State instead relies solely on conjecture that vandals pilfered or destroyed documents left on the Island after the federal immigration station was closed in 1955.

The Special Master correctly determined that the record contains no evidence supporting New York's claims of prejudice. While New York's expert, Harlan D. Unrau, introduced evidence that vandals had stolen "plumbing" and "whole sets of dishes" from Ellis Island, Report at 105, n.42, he offered no testimony that documents relevant to this action were also stolen. In fact, Unrau admitted that he had no knowledge of any historic documents relating to Ellis Island that had been lost in the years after the immigration station closed. T2165-1 through T2166-8. Apart from the somewhat incredulous claim that thieves would have been interested in pilfering decades-old bureaucratic documents relating to the operation of an immigration station, New York's claim of "prejudice" is made even less credible by that State's

Furthermore, this Court has held that any "official act" or "expression" of "any official" is significant to a State's claim of sovereignty over disputed territory. *Massachusetts, supra*, 271 U.S. at 95. Surely, this allows for an expression of non-acquiescence to be made in a manner other than through the initiation of legal proceedings.

speculation that the documents presumably stolen from the Island would have proven helpful to New York at the trial of this matter.

Of the vast amounts of documents and other evidence available to the States through the National Park Service, the Immigration and Naturalization Service, the National Archives, and other locations, New York has been able to muster only a paltry smattering of evidence of its purported prescription over the disputed lands. This is hardly surprising since New York had ceded jurisdiction over the land and the federal government exercised exclusive authority there. It strains credibility for New York to claim that of the staggering array of documents generated by the federal government with respect to the operation of Ellis Island, vandals stole essential evidence necessary to establish New York's acts of sovereignty over the filled portions of the Island, as well as New Jersey's acquiescence therein.

Furthermore, the record contains no evidence of the record retention policies in place at government agencies that may have records relevant to this matter. The record contains no evidentiary support for New York's claim that evidence that otherwise would have been available to that State was not retained by relevant agencies. For example, the record contains no testimony establishing that New York's tax authorities destroyed records relevant to this matter, as suggested by New York. Nor is there any proof in the record that New York was rebuffed in any attempt to secure documents. In addition, during the pretrial proceedings in this matter, New York never suggested that it needed further time to investigate its claims.²²

²² The brief of the proposed historian *amici* suggests that any lack of evidence in support of New York's claims may be the result of an inadequate investigation by that State. The proposed *amici* cite dozens of articles, letters, and other materials they allege are material to this matter

Moreover, New York's claim that the recollections of relevant witnesses were lost as a result of delay is not supported by the record or common sense. No evidence was offered by New York to support its claim that the recollections of the individuals who worked and lived on Ellis Island have been lost to time. Ellis Island holds a singularly important position in the history of the United States and in the history of immigration in this nation. It is one of the most widely celebrated places in our nation and the subject of countless books, letters, diaries, and memoirs. Indeed, visitors to the immigration museum now operating on the Island need only take a few steps before encountering the oral histories of dozens of individuals who passed through Ellis Island. For New York to claim that the thoughts and perceptions of those who spent time on the Island have been lost is simply unfounded. The record of this case makes plain that thousands of pages of correspondence, contracts and official documents concerning Ellis Island were made available to the Special Master.²³

but that were not introduced into the record by New York. According to the proposed *amici*, this evidence is available "in publicly accessible state or university collections" and at other collections around the country. (Proposed Historian *Amici* Brief at 7, n.5 and 29, n.16). New York had every opportunity to locate this evidence prior to the hearings in this matter and to present testimony regarding these documents in support of its claims. New York either failed to locate these materials or made the strategic decision not to seek their introduction into the record. Thus, an alleged delay by New Jersey cannot be blamed for New York's failure to undertake a zealous investigation.

²³ There is no reason for this Court to remand this matter for further evidentiary hearings as suggested by the proposed historian *amici*. New York has never made such a request from this Court, nor does the record support such an extraordinary step. Thousands of pages of documents were produced by both parties during discovery, resulting in hundreds of exhibits, numerous expert reports and detailed trial affidavits. Had the proposed *amici* wished to participate in this matter, they had every opportunity to present their views during the trial phase, when the Special

CONCLUSION

For the reasons stated herein, New Jersey respectfully requests that the Court overrule the exceptions of New York and sustain the exceptions of the New Jersey.

Respectfully submitted,

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Dated: August 29, 1997

Master was collecting evidence. The record below suggests that this matter was exhaustively researched and that the relevant documents were presented to the Special Master by the parties and their experts.



SEP 15 1997

IN THE

Supreme Court of the United States

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF
IN SUPPORT OF EXCEPTIONS AND
SUR-REPLY BRIEF IN SUPPORT OF EXCEPTIONS**

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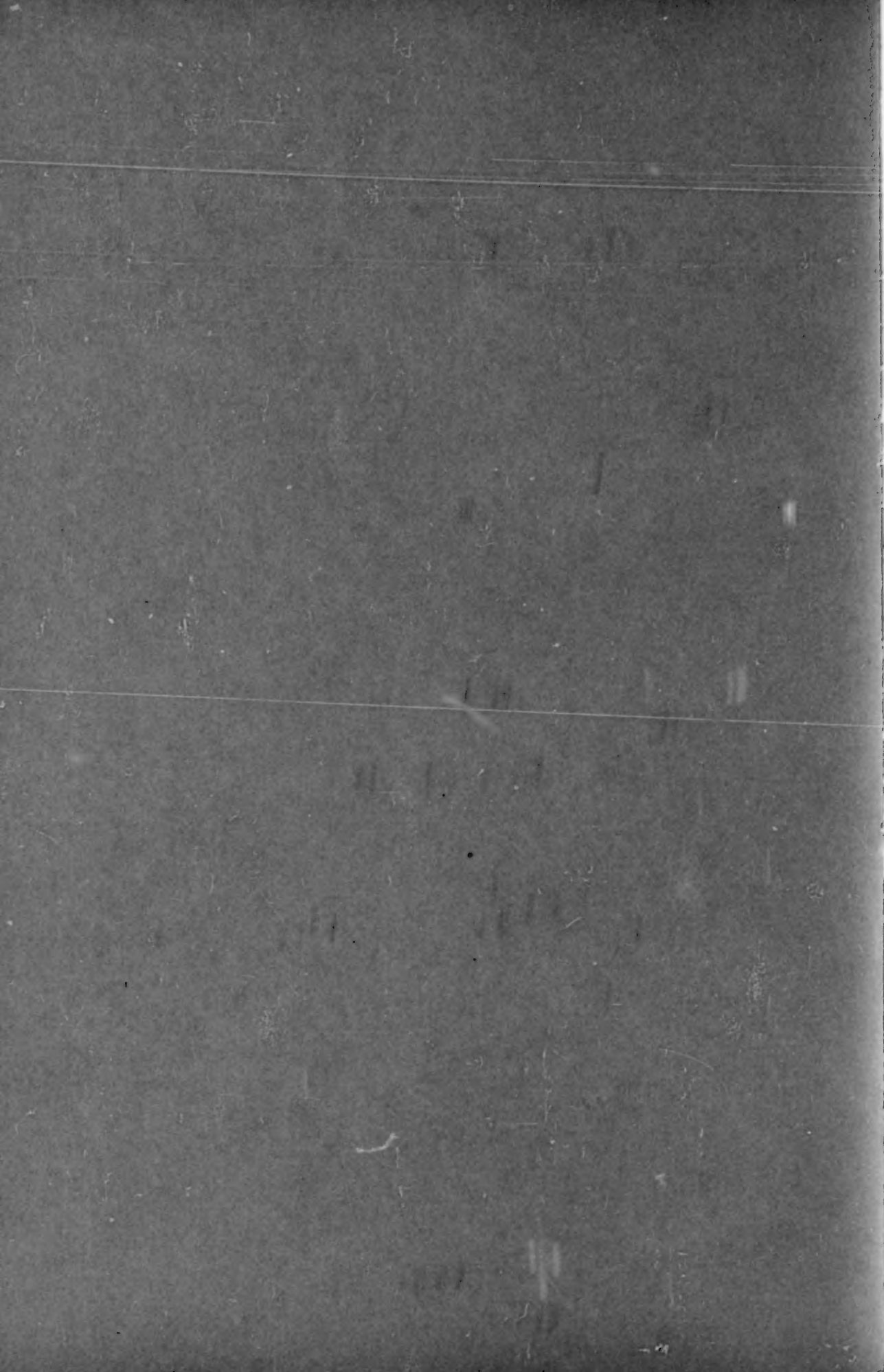
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No. 120, Original

In The

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October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF
IN SUPPORT OF EXCEPTIONS**

In this original jurisdiction action, the Court on June 16, 1997, issued an order receiving the Report of the Special Master and establishing a schedule for the filing of Exceptions to the Report and Replies to these Exceptions. 117 S.Ct. 2451 (1997). The State of New York timely filed its Exceptions, and the State of New Jersey timely filed its Reply thereto. The United States has also filed a Brief *Amicus Curiae* almost uniformly supporting New Jersey's positions. New York now seeks leave to file the attached sur-reply brief in response to New Jersey's Reply and to the Brief *Amicus Curiae* of the United States.

New York's posture in this case is analogous to that of the petitioner in a case in which the Court has granted a writ of certiorari. In such a case, the petitioner has an unqualified right, under Rule 25.3 of this Court, to file a reply brief within thirty days after receiving respondent's brief. We note, in addition, that under Rule 17.5, a state seeking leave to file a complaint in an original jurisdiction case has the right to file a reply brief. Moreover, in its most recent original jurisdiction case, the Court authorized the filing of sur-reply briefs on the merits by both sides. *See United States v. Alaska*, 116 S.Ct. 1823 (1996) (No. 84 Orig.).

The brief will be especially useful to the Court because certain issues that are not addressed in New York's Brief on Exceptions are raised in New Jersey's Reply and/or in the United States' brief. These include, *inter alia*, (1) the significance of the fact that Articles Third and Fifth of the 1834 Compact between New York and New Jersey mention "improvements" to shorelines, whereas Article Second, relied on by New York, does not; (2) the argument that New York's 1800 cession to the United States of a measure of jurisdiction over Ellis Island left no room for any exercise of authority by New York over the Island; (3) New Jersey's reliance on events occurring after 1955 to dispute New York's entitlement to sovereignty over Ellis Island by virtue of the doctrine of prescription and acquiescence; (4) New Jersey's insistence that a 1986 "Memorandum of Understanding" between the Governors of New York and New Jersey, evidencing an agreement never adopted by the New York legislature to share tax revenues from Ellis Island and Liberty Island, demonstrates New York's "admission" that New Jersey is entitled to such revenues from Ellis Island; and (5) the United States' attempt to retreat from the position, taken only two years ago in *Kansas v. Colorado*, 514 U.S. 673 (1995), that laches applies in cases involving interstate compacts.

Permitting New York to address these points in a sur-reply brief will help focus the issues of the case for the Court. It will place New York on an equal footing with a petitioner or appellant in a case not involving this Court's original jurisdiction, and with the litigants in the Court's most recent original jurisdiction case. Accordingly, we request that the Court grant New York's motion for permission to file the attached sur-reply brief.

Dated: Albany, New York
September 15, 1997

Respectfully submitted,

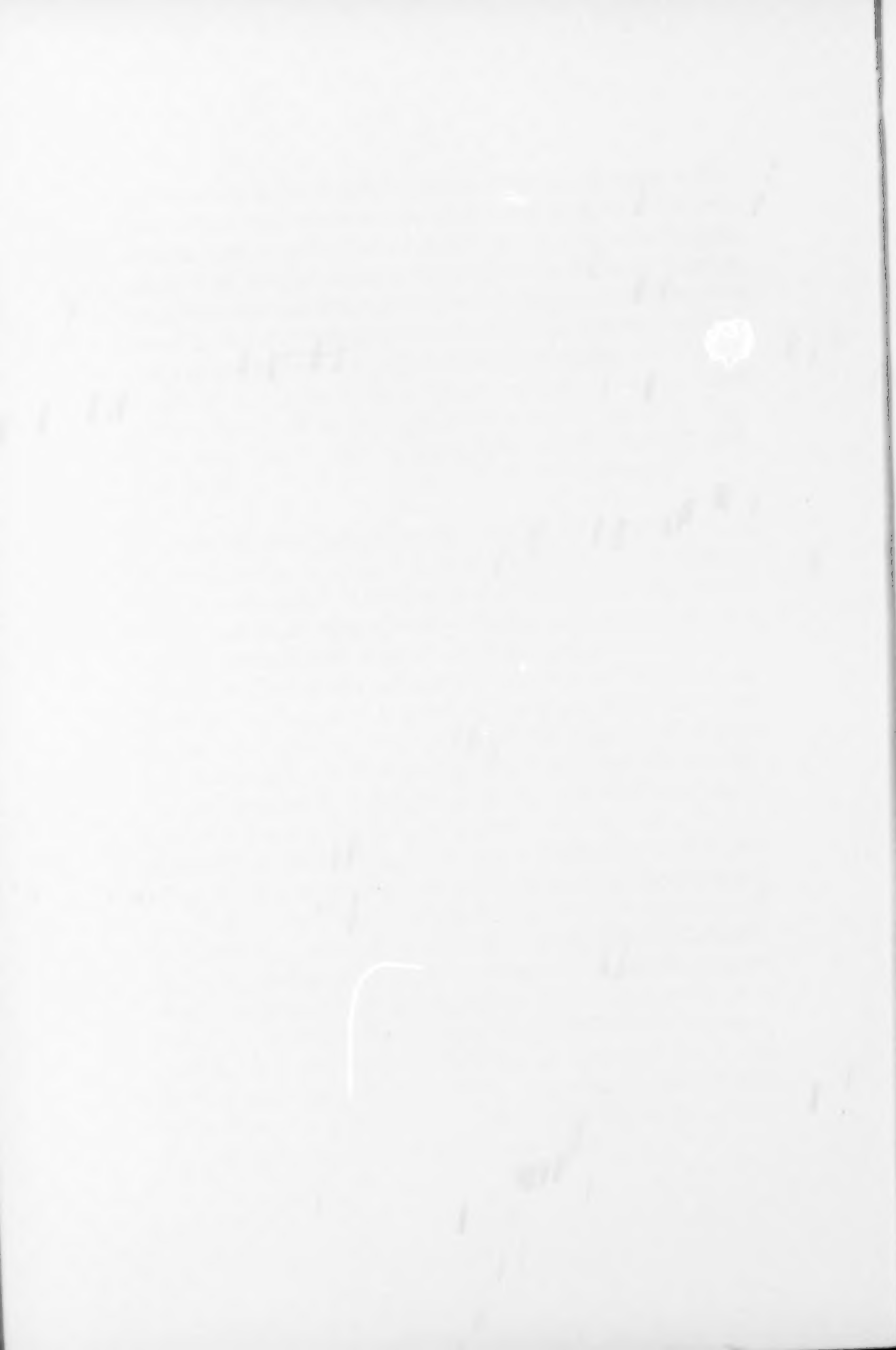
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IN THE

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**SUR-REPLY BRIEF OF THE STATE OF NEW YORK
IN SUPPORT OF ITS EXCEPTIONS TO THE REPORT
OF THE SPECIAL MASTER**

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Defendant.

**SUR-REPLY BRIEF OF THE STATE OF NEW YORK
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OF THE SPECIAL MASTER**

ARGUMENT

POINT I

**UNDER ARTICLE SECOND OF THE COMPACT,
NEW YORK HAS JURISDICTION OVER THE
FILLED PORTION OF ELLIS ISLAND**

As demonstrated in New York's Brief on Exceptions (Exceptions pp 11-21),¹ the plain language of Article Second of the

¹Parenthetical citations preceded by "Exceptions" are to New York's Brief on Exceptions. Parenthetical citations preceded by "NJ Br" are to New Jersey's

(continued...)

1834 Compact between New York and New Jersey, especially when viewed in light of the widespread use of landfill by both states in New York Harbor and the states' concern with maintaining New York's control over commerce and navigation in the Harbor, indicates that the entirety of Ellis Island is subject to New York's jurisdiction. Nothing in the arguments of either New Jersey or *amicus curiae* United States undermines either the factual predicates or legal reasoning of New York's argument.

Thus, neither New Jersey nor the United States can refute New York's showing (Exceptions pp 13-14) that, by 1834, landfill had been extensively employed to expand both Manhattan Island and the two New Jersey cities nearest Ellis Island. Nor, as demonstrated in New York's Reply Brief (pp 13-16), can New Jersey credibly contend that Ellis Island itself had not been extended by landfill by the time of the Compact. The United States (US p 14) merely offers the Special Master's observation that "the filled additions have expanded Ellis Island to nine times its original size." This fact has no real significance. Ellis Island was in 1834 and remains today a small island: the total area awarded New Jersey by the Special Master is less than four one-hundredths of a square mile.

Indeed, New Jersey's own arguments support New York's interpretation of the Compact. New Jersey first notes (NJ Br p 2) that, while "Article II contains no reference to future improve-

¹(...continued)

Reply Brief. Parenthetical citations preceded by "US" are to the United States' Brief *Amicus Curiae*. Parenthetical citations preceded by "NY" are to the numbered exhibits submitted by the State of New York, and those preceded by "NJ" are to the numbered exhibits submitted by the State of New Jersey. Parenthetical citations preceded by "T" are to the trial transcript, and those preceded by "R" are to the Final Report of the Special Master.

ments or filling . . . Articles III and V explicitly provide that New Jersey and New York shall have jurisdiction over improvements 'made and to be made' on their respective shores." The provisions in question award "exclusive jurisdiction" over "improvements" on the shore of New Jersey and of Staten Island to New Jersey and New York respectively. There could be no better illustration that, as New Jersey here intimates but elsewhere disputes, the Commissioners who drafted the Compact clearly envisioned the states' expansion of their territory in New York Harbor by means of landfill. *See, e.g., Pollard's Lessee v. Files*, 43 U.S. (2 How.) 591, 592 (1844) (equating "fill[ing] up" of subaqueous land with "improvement").

New Jersey suggests that the mention of "improvements" in Articles Third and Fifth but not in Article Second is fatal to New York's argument. In fact, it strengthens New York's case. "Exclusive jurisdiction" over "improvements made and to be made" on the New Jersey shore is awarded to New Jersey in Article Third as an exception to the otherwise "exclusive jurisdiction" of New York "of and over all the waters of the bay of New York," and the same is granted to New York in Article Fifth as an exception to New Jersey's otherwise "exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey." Without these exceptions, New York's jurisdiction over surface traffic and commerce in the Harbor could arguably have included authority over improvements on the New Jersey shore, or New Jersey might arguably have claimed authority over development of portions of the Staten Island shoreline. By contrast, the exclusive jurisdiction over the waters surrounding the islands in New York Bay,² as well as exclusive jurisdiction over the lands beneath these waters and jurisdiction over the islands themselves, lies with New York.

²As the Compact makes clear, Staten Island is not in New York Bay.

Because there was no possibility of conflict between New York's Article Third "exclusive jurisdiction" over "the waters of the bay" and its Article Second jurisdiction over the islands in the Bay, there was no need to specify that New York retained jurisdiction over "improvements" on these islands. The only other possible explanation—that the states in 1834 envisioned that improvements, including landfill, would be placed upon the New Jersey and Staten Island shores but no place else in the Harbor, leaving the remaining islands bereft of wharves, docks and fill—is unsupported by the historical record and contrary to reason and common sense.

New Jersey also suggests that the Compact's central purpose of retaining New York's control over commerce and navigation in New York Harbor did not, as New York argues (Exceptions pp 15-17), entail an award to New York of sovereignty over an expanded Ellis Island. New Jersey contends (NJ Br pp 6-7) that nothing supports New York's claim that "control of the Island and surrounding fill were [*sic*] a necessary ingredient to its authority to promote 'the interests of commerce and navigation.' " But New Jersey, refuting its own argument, demonstrates this necessity elsewhere in its brief. According to New Jersey (NJ Br p 14), New York's exclusive jurisdiction, which vindicates "the interests of commerce and navigation," applies only "in the waterways" of the Harbor. Thus, New Jersey reasons, "[o]nce the submerged lands around the original Island were filled, there was no longer any basis upon which New York could exercise jurisdiction over navigation and commerce" (NJ Br p 14).

New Jersey's position illustrates perfectly why the Compact awarded New York Ellis Island in its entirety. As a matter of common sense, exclusive jurisdiction over commerce and navigation cannot be confined literally to "the waters" of New York Harbor. Regulation of commerce and navigation necessar-

ily entails regulation not only of "the waters" *per se* but also of the land masses in and around them, in order to permit meaningful control over the military and commercial traffic traveling between these land masses.³ Under New Jersey's interpretation of the Compact, however, any filling of the subaqueous land surrounding Ellis Island would extinguish the "basis upon which New York could exercise jurisdiction over navigation and commerce" around the Island.

New Jersey's brief thus starkly dramatizes the choice offered the Court between the states' competing interpretations of the Compact. According to New Jersey, its sovereignty over subaqueous land empowered it to surround Ellis Island (as well as Bedloe's Island and any other island west of the mid-point of the Bay) with landfill and thus both to cut Ellis Island off from the remainder of the Harbor and to neutralize the retention of control over navigation and commerce that was New York's great object in negotiating the Compact. These results cannot have been what the Commissioners who forged the Compact intended. By granting New York sovereignty over "Ellis Island" and other islands in the Bay, without limitation, the Compact assured that these results would not come to pass.

³The history of New York Harbor illustrates the inseparability of jurisdiction over the islands in the Harbor and jurisdiction over "the waters" thereof. When, in 1900-1901, the entrepreneur Edward Cragin sought to create an artificial hundred-acre island in New York Bay not far from Ellis Island, the federal Harbor Line Board declined to authorize a modification of harbor lines to accommodate the project, in part because of its probable interference with navigation (NJ 331-334).

POINT II**NEW YORK HAS OBTAINED SOVEREIGNTY OVER
ELLIS ISLAND THROUGH ITS EXERCISE OF
DOMINION OVER THE ISLAND AND NEW
JERSEY'S ACQUIESCENCE IN THAT EXERCISE****A. New York Exercised Prescriptive Authority Over Ellis
Island**

New York's Brief on Exceptions recites the many instances of New York's exercise of dominion over Ellis Island (Exceptions pp 22-30). Nothing in the arguments of New Jersey or the United States vitiates New York's overwhelming showing that it alone, and not New Jersey, acted on the filled portions of the Island.

New Jersey (NJ Br pp 24-26) suggests that the federal government's possession and occupation of the Island left no room for the exercise of any jurisdiction by New York. The cases of this Court, however, indicate otherwise. Even when a state's cession of jurisdiction to the federal government over territory within the state is total, there remain many areas in which a state may exercise its authority. As the Court has noted, state laws do not "become inoperative within [federal territory] upon the cession to the United States of exclusive jurisdiction over it." *Chicago, R.I. & P. Ry. Co. v. McGlinn*, 114 U.S. 542, 546 (1885). Rather, "the municipal laws of the [state] -- that is, laws which are intended for the protection of private rights -- continue in force until abrogated or changed by the new government or sovereign." *Id.*

[W]ith respect to . . . laws affecting the possession, use, and transfer of property, and designed to

secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.

Id. at 546-47 (Kansas statute, "being in no respect inconsistent with any law of the United States, and never having been changed or abrogated," remained in force after cession to United States).

Nor is it only statutes in force at the time of a state's cession of jurisdiction that may be applied in federal territory. If "the same basic scheme" of regulation has been "in effect since th[e] time" of the cession, "the current [scheme], albeit in the form of different regulations," also applies. *Paul v. United States*, 371 U.S. 245, 269 (1963) (California laws modified since time of cession were enforceable in federal enclave). It is presumably for this reason that, for example, the authorities on Ellis Island applied New York marital law even after that law changed in 1907 (NY 657).

State law can, moreover, also be applied on federal territory when Congress expressly so authorizes. Thus, for example, in the wake of *Murray v. Joe Gerrick & Co.*, 291 U.S. 315 (1934), which had held that state workmen's compensation laws had no effect in federal enclaves, Congress passed the Buck Act, 49 Stat. 1938 (1936), authorizing application to all United States property "which is within the exterior boundaries of any State" of that state's workmen's compensation law. As noted in New York's Brief on Exceptions (Exceptions pp 26-27), both before and after this remedial legislation, New York's workmen's compensation law was applied to claims arising from work on

the filled portions of Ellis Island (NY 283, 284, 306, 363, 795, 802).

Thus, even if New York's cession of jurisdiction to the United States had been broader than it was, there were extensive areas in which New York's "municipal laws" could be applied. It is, moreover, New York's laws that were applied in these areas. What is most striking about the evidence on this subject is its uniformity. It is undisputed that between 1890 and 1955 New Jersey issued no birth, death or marriage certificates connected with Ellis Island. The New Jersey Legislature, unlike both the New York Legislature and the people of New York, never passed any enactment expressly pertaining to New Jersey's sovereignty over Ellis Island. Neither the New Jersey state courts nor the federal courts in New Jersey ever asserted jurisdiction over events occurring on the filled portions of Ellis Island or over the residents of the Island, and no court ever applied New Jersey law to those events or those residents. The Island's residents were registered to vote not in New Jersey's elections, but in New York's. New Jersey, unlike New York, never included either the whole of Ellis Island or its filled portions within its boundaries for state census purposes (and likewise there is no evidence that it ever protested the federal government's inclusion of the entirety of the Island, including its population residing on fill, within New York rather than New Jersey for federal census purposes). With one exception, later acknowledged to be an error,⁴ New Jersey wage or construction standards were never applied to Ellis Island. Neither the President nor Congress nor the Immigration and Naturalization Service (INS) ever spoke of "Ellis Island, New Jersey." No individual employee of a federal agency suggested that Ellis Island was in New Jersey without correcting himself or being

⁴This is discussed in New York's Brief on Exceptions at pp 38-39.

corrected in short order. And no private citizen appears ever to have believed that Ellis Island was anywhere but in New York. All extant evidence indicates that during the immigration period Ellis Island was, and was believed to be, in New York.

Even after New York's cession of jurisdiction over Ellis Island to the federal government, the exercise of authority "designed to secure good order and peace in the community, and promote its health and prosperity" remained with a state. All the evidence in this case indicates that the state was New York. Unable to produce any direct documentary evidence to refute this proof of prescription and acquiescence, New Jersey attaches talismanic significance to a single historian's view of its legal import. Do all extant death certificates from Ellis Island come from New York? No matter, for INS historian Marian Smith "could not find any regulation or policy of the State or City, or the federal government, that would support a finding that Ellis Island deaths were routinely recorded in New York" (NJ Br p 28). Are all extant Ellis Island birth certificates likewise from New York? New Jersey says it must nonetheless prevail, for Smith opines that "there was no proof that the federal government had any policy of recording all Ellis Island births in New York" (NJ Br p 29). Does record evidence reveal that the New York City police investigated matters on Ellis Island? This is immaterial, for Smith "ha[s] yet to see any evidence of the New York City or State police on the Island exercising any of their powers" (NJ Br p 31). Do the recollections of an interpreter who worked on Ellis Island include the memory of "hundreds and hundreds of weddings of all nationalities and types" (NY 74 p 409)? This cannot be, says Smith, for she has found no evidence of marriages held on Ellis Island, even though she has attempted to do so (T 1358). Does INS correspondence from Ellis Island throughout the immigration period originate in "New York," and did a high ranking INS official in 1923 write that "the Bureau has always considered

Ellis Island as a part of the State of New York" (NY 971)? This is not probative, says New Jersey, for Smith "testified that the agency acknowledged . . . New Jersey's sovereignty over the filled lands" (NJ Br p 36).

The pattern is clear. On the one hand, New York offers abundant and uniform documentary evidence indicating that, in the area of "municipal law" in which state authority remained to be exercised after cession of jurisdiction over Ellis Island to the United States, it was always New York, never New Jersey, whose laws applied on the Island. On the other hand, there is the *ipsa dixit* of a trial witness who was present for none of the events at issue. The direct evidence of New York's exercise of prescriptive authority over the Island is overwhelming, and is in no way neutralized by New Jersey's resort to a historian's testimony.

B. New Jersey's Acquiescence in New York's Exercise of Authority over Ellis Island Entitles New York to Sovereignty over the Island

As demonstrated in New York's Brief on Exceptions (pp 30-40), New Jersey acquiesced in New York's exercise of sovereignty over Ellis Island during the immigration period. Although New Jersey (NJ Br pp 37-44) and the United States (US pp 18-19) attempt, unsuccessfully,⁵ to dispute New York's character-

⁵ The position of the United States on the issue, and indeed its presence as *amicus* in this case, are something of a mystery. The United States (US pp 1-2) avows no particular interest in any issue involved, and its brief demonstrates no familiarity with any exhibit, testimony, expert report or document other than the Special Master's Report. On the one issue on which the United States might have something to contribute -- namely, New Jersey's contention (NJ Br p 28)

(continued...)

ization of New Jersey's asserted acts of "counter-prescription" as sparse, brief, obscure and erroneous, New Jersey devotes more of its argument (NJ Br pp 15-24) to an irrelevant proposition that no one disputes: that there is sufficient evidence of New Jersey's non-acquiescence after 1955, when the immigration period had concluded. By 1955, however, New Jersey's acquiescence throughout the immigration period had already assured New York of its sovereign rights over the entirety of Ellis Island, and what New Jersey did thereafter made no difference.

As demonstrated by New York in its Brief on Exceptions (Exceptions pp 21-22), and as now conceded by New Jersey (NJ Br p 44 n 20), the doctrine of prescription and acquiescence is "akin to adverse possession." Under adverse possession, possession of property for a given length of time entitles the possessor to title to the property, regardless of where the title originally lies. The adverse possession simply perfects with the expiration of the designated period. *See, e.g., Joines v. Patterson*, 274 U.S. 544, 552-554 (1927); *Montoya v. Gonzales*, 232 U.S. 375, 377-378 (1914). Similarly, a state's possession of territory "for a certain length of time . . . excludes the claim of every other." *Virginia v. Tennessee*, 148 U.S. 503, 524 (1893). The only difference is that adverse possession is governed by a strict statute of limitations, whereas no express limitation period controls prescription and acquiescence.

The question, then, is not what New Jersey did after 1955, but whether the period of New York's exercise of dominion over Ellis Island and New Jersey's acquiescence in that exercise was

⁵(...continued)

that "[t]he federal government has consistently held the opinion that the portions of Ellis Island created by fill are subject to New Jersey sovereignty" -- it says nothing.

sufficiently long to entitle New York to permanent possession of the Island. New Jersey does not address this question, to which the answer must be yes. If, as New York demonstrates (Exceptions pp 30-31), New Jersey's insistence on granting to the United States a deed to the subaqueous land on which the Ellis Island landfill was placed was not an assertion of sovereignty over the Island itself, then the prescriptive period ran for 65 years, from 1890 (when the Island was expanded by landfill) to 1955. If the pronouncements of the New Jersey Board of Riparian Commissioners with respect to the subaqueous land are deemed assertions of sovereign authority over Ellis Island, then the prescriptive period begins in 1904. However it is measured, the period ran for more than fifty years—years during which, as demonstrated in New York's Brief on Exceptions, any suggestions that New Jersey owned Ellis Island were infrequent, brief, concededly erroneous, obscure, and not in the nature of assertions of sovereignty. Although the shortest prescriptive period recognized in the cases of this Court is sixty years, *see Michigan v. Wisconsin*, 270 U.S. 295, 317 (1926), New York can discover, and New Jersey offers, no reason why a period of more than fifty years should not likewise be sufficient.

Thus, what happened after 1955 made no difference; the matter was effectively resolved in New York's favor by then, although (as with any adverse possession) it has required legal action to ratify it. Nonetheless, New Jersey makes so much of one post-1955 episode (NJ Br pp 23-24), and is so mistaken in what it says, that its comments require a response.

In 1986, the Governors of New York and New Jersey executed a Memorandum of Understanding, declaring that

"[t]here is now pending a lawsuit⁶ that seeks to determine the respective sovereignty and jurisdiction of the States of New Jersey and New York over Liberty and Ellis Islands," expressing the desire "that such conflicts be avoided," and dedicating tax revenues "attributable directly to Ellis and Liberty Islands" to a Fund whose purpose "shall be to provide aid to homeless persons within the States of New Jersey and New York" (R App H). To New Jersey, this Memorandum "conclusively establishes that New Jersey had not acquiesced in any claim by New York to jurisdiction over the filled land," and constitutes an "admission . . . that New Jersey was entitled to a portion of the tax revenue collected on the Island" (NJ Br pp 23-24).

The most obvious flaw in New Jersey's argument is that the Memorandum of Understanding expressly required adoption by each state's legislature to take effect—an event that never occurred. Because the New York Legislature refused to enact it into law, the Memorandum remained an unsuccessful proposal and a legal nullity. Moreover, it cannot be news to New Jersey that such proposals among states, like the dealings between any other contracting parties, entail trade-offs and concessions on matters as to which the conceding party is confident of its correctness. Indeed, New Jersey has insisted throughout this litigation, and insists yet again in its brief (NJ Br p 3), that much of what New York was awarded in the 1834 Compact consisted of territories and powers to which New Jersey believed itself indisputably entitled.

⁶The case was *Guarini v. New York*, 521 A.2d 1362 (N.J. Super Ct. Ch. Div.), *aff'd*, 521 A.2d 1294 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 484 U.S. 817 (1987). This case, in which New Jersey conceded that, as of 1984, New York and only New York was exercising taxing authority over Ellis Island (NY 950-951), belies New Jersey's contention (NJ Br p 30) that there is no proof that New York exercised taxing authority over Ellis Island before 1991.

Ultimately, however, the circumstances and terms of the 1986 Memorandum of Understanding are not an issue in this case. More than thirty years earlier, New York's continuous exercise of prescription over the filled portions of Ellis Island and New Jersey's acquiescence in that exercise gave rise to New York's indefeasible right of sovereignty over the entire Island. Nothing that occurred thereafter could change that result.

POINT III

NEW JERSEY IS GUILTY OF LACHES BY VIRTUE OF ITS DELAY IN COMMENCING THIS ACTION

A. Laches Applies to Original Jurisdiction Cases Involving Interstate Compacts

Neither New Jersey nor the United States makes any effort to respond on its merits to New York's argument that laches should be and has been applied to boundary disputes involving interstate compacts. In *Kansas v. Colorado*, 514 U.S. 673 (1995), this Court was urged by the United States to recognize the validity of the laches defense in interstate compact cases. Without deciding whether laches applied in such cases, the Court analyzed the matter before it by determining that Colorado had failed to prove an indispensable element of its laches defense. *Id.* at 687-689. Two years later, backpedaling vigorously, the United States insists (US p 21) that its position in *Kansas v. Colorado* that laches is "applicable to actions to enforce a compact" applies only "in the context of an interstate water dispute." Nothing in either the United States' brief in *Kansas v. Colorado* or this Court's opinion in that case suggests that, if laches applies to interstate compacts, it does not apply to compacts that establish interstate boundaries.

New York's Brief on Exceptions demonstrates (pp 40-45) that this Court has applied both laches and prescription and acquiescence in an interstate boundary dispute based on a compact and that both these doctrines, which vindicate different equitable principles, should be applied in the present case. Neither the United States nor New Jersey offers a reasoned response to a single point of New York's argument. Having recognized the potential applicability of laches in interstate compact cases, the Court should apply the doctrine in the present case.

B. New Jersey's Failure Timely to Commence this Action Prejudiced New York

Of the two elements of the laches defense, New Jersey concedes one of them. It makes no effort to excuse its lack of diligence in commencing a suit to seize Ellis Island. It concentrates instead (NJ Br pp 47-49) on the question of whether its delay has caused prejudice to New York. New Jersey fails, however, to undermine New York's showing that New Jersey's delay in bringing this suit has rendered valuable documentary and testimonial evidence unavailable.

Part of New Jersey's error stems from its focus on the availability of evidence that is not pertinent to New York's exercise of prescriptive dominion over Ellis Island. Noting that the Brief of *amici curiae* New York Historical Society, *et al.*, relies on publicly-accessible evidence that was not introduced at trial, New Jersey rebukes New York (NJ Br pp 48-49 n 22) for its "fail[ure] to locate these materials" and present them at trial. This simply misses the point. The materials cited in the brief by *amici* date from the 1830s and earlier, and are pertinent only to the issue of Compact interpretation. It is not, however, evidence of the intentions of the Compact's framers in 1834, but evidence of prescription and acquiescence relating to the immigration

period of 1890 to 1954, that New Jersey's delay has rendered unavailable.

Indeed, the contrast between evidence relevant to Compact interpretation and evidence bearing on New York's exercise of dominion over Ellis Island demonstrates the validity of New York's laches argument. The materials probative of the meaning of the Compact (or any other agreement between sovereigns) are, without exception, either documents memorializing formal acts of state or documents originating or connected with prominent statesmen. These are precisely the sorts of materials that are likeliest to be protected from the damage inflicted by time. By contrast, the materials pertinent to the questions connected with prescription and acquiescence—what ordinary people, unaware that there was any disagreement about sovereignty over Ellis Island, did, said, and thought—are far less likely to have been intentionally preserved or to have withstood the passage of years.

New Jersey labels "incredulous" (*sic*) New York's suggestion that, abandoned in leaky buildings for more than twenty years, documents relevant to the case might have vanished or been destroyed (NJ Br pp 47-48). It complains that, although the population of Ellis Island at no time exceeded a few hundred, and forty-two years passed between abandonment of the Island by the INS and trial of this case, New York's claim "that the recollections of the individuals who worked and lived on Ellis Island have been lost to time" lacks "common sense" (NJ Br p 49). It rebukes New York for neglecting "the [preserved] oral histories of dozens of individuals who passed through Ellis Island," (NJ Br p 49), while ignoring the likelihood that these recollections, themselves now many years old, say nothing about the then-noncontroversial subject of New York's sovereignty over Ellis Island.

In short, New Jersey argues, "New York's claim of prejudice is grounded on nothing more than baseless speculation that evidence supporting [its] position was destroyed prior to the time that this action was commenced" (NJ Br p 47). Like many other things, this contention is more interesting turned on its head: New Jersey's argument is premised on its baseless speculation that nothing was destroyed.⁷ In view of the long neglect of the physical plant at Ellis Island, the informality and hence the ephemerality of the documents most relevant to New York's claim of prescription, and the many decades that passed before New Jersey commenced this suit, it seems most improbable that nothing significant was lost.

There is no telling what such evidence might be. Perhaps, for example, an official INS document modifying that agency's stated view that all of Ellis Island is in New York has vanished forever. Perhaps a letter from New Jersey Senator Hamilton Kean retracting his public position that the filled portion of the Island is part of New York (NY 292) has been destroyed. The existing record evidence, however, gives rise to a strong presumption that the records which have been lost were comparable to those which have survived, all of which support New York's position. And this likelihood aside, we can be certain that New Jersey's delay has rendered probative evidence unavailable to New York. That is enough to make New Jersey guilty of laches.

⁷ If, for example, New Jersey imagines that seventy-, eighty-, or ninety-year-old birth certificates, death certificates, and marriage certificates have all been preserved in pristine condition and in accessible locations, why has it produced no such documents?

POINT IV

THE SPECIAL MASTER WAS EMPOWERED TO MODIFY WHAT HE ERRONEOUSLY BELIEVED TO BE THE BOUNDARY LINE BETWEEN THE STATES ON ELLIS ISLAND

As noted in New York's Reply Brief (pp 16-17), although the Special Master erred in dividing Ellis Island between New York and New Jersey, his modification of the boundary was a valid exercise of his equitable powers. The Special Master recognized that actions to determine sovereign boundaries "are in the nature of equitable proceedings," *United States v. California*, 332 U.S. 19, 26 (1947), and understood that a strict "template" approach to Ellis Island boundaries would be inconvenient for both states and unfair to New York (R 146-150, 162-167). Now, however, the United States (US pp 24-30), relying on *Washington v. Oregon*, 211 U.S. 127 (1908), argues that "the boundary modification that the Master proposes appears to exceed the Court's historic power."

A more recent case, relied on by the Special Master (R 148-150) but not addressed by the United States, demonstrates that the Court may consult equity and convenience in establishing interstate boundaries. In *New Jersey v. Delaware*, 291 U.S. 361 (1934), the question before the Court was whether to draw the boundary between the states at the "geographical center" of the Delaware River and Delaware Bay, or at "the middle of the main shipping channel" or "Thalweg." *Id.* at 379. A strict application of the relevant law suggested that the boundary be the Thalweg at some points and the geographical center at others. But this approach, the Court said, would produce "a crooked line . . . without relation to the needs of shipping." *Id.* at 385. The "inconvenience" thus produced was "a reason for following the

Thalweg consistently through the river and bay alike," and thus "follow[ing] the course furrowed by the vessels of the world."
Id.

The Special Master was similarly guided by practicality in fixing the boundary of Ellis Island. The template approach would have divided three different buildings on the Island and left New York landlocked. The Special Master's modification of this boundary was within his equitable powers, and should be disturbed only in order to award the entirety of Ellis Island to New York.

CONCLUSION

FOR THE FOREGOING REASONS, THE COURT SHOULD REJECT THE REPORT OF THE SPECIAL MASTER RECOMMENDING THAT THE STATE OF NEW JERSEY BE DECLARED SOVEREIGN OVER THE LANDFILLED PORTIONS OF ELLIS ISLAND, AND ISSUE A DECREE DECLARING THAT THE ENTIRETY OF ELLIS ISLAND IS THE TERRITORY AND SUBJECT TO THE SOVEREIGNTY OF THE STATE OF NEW YORK.

Dated: Albany, New York
September 15, 1997

Respectfully submitted,

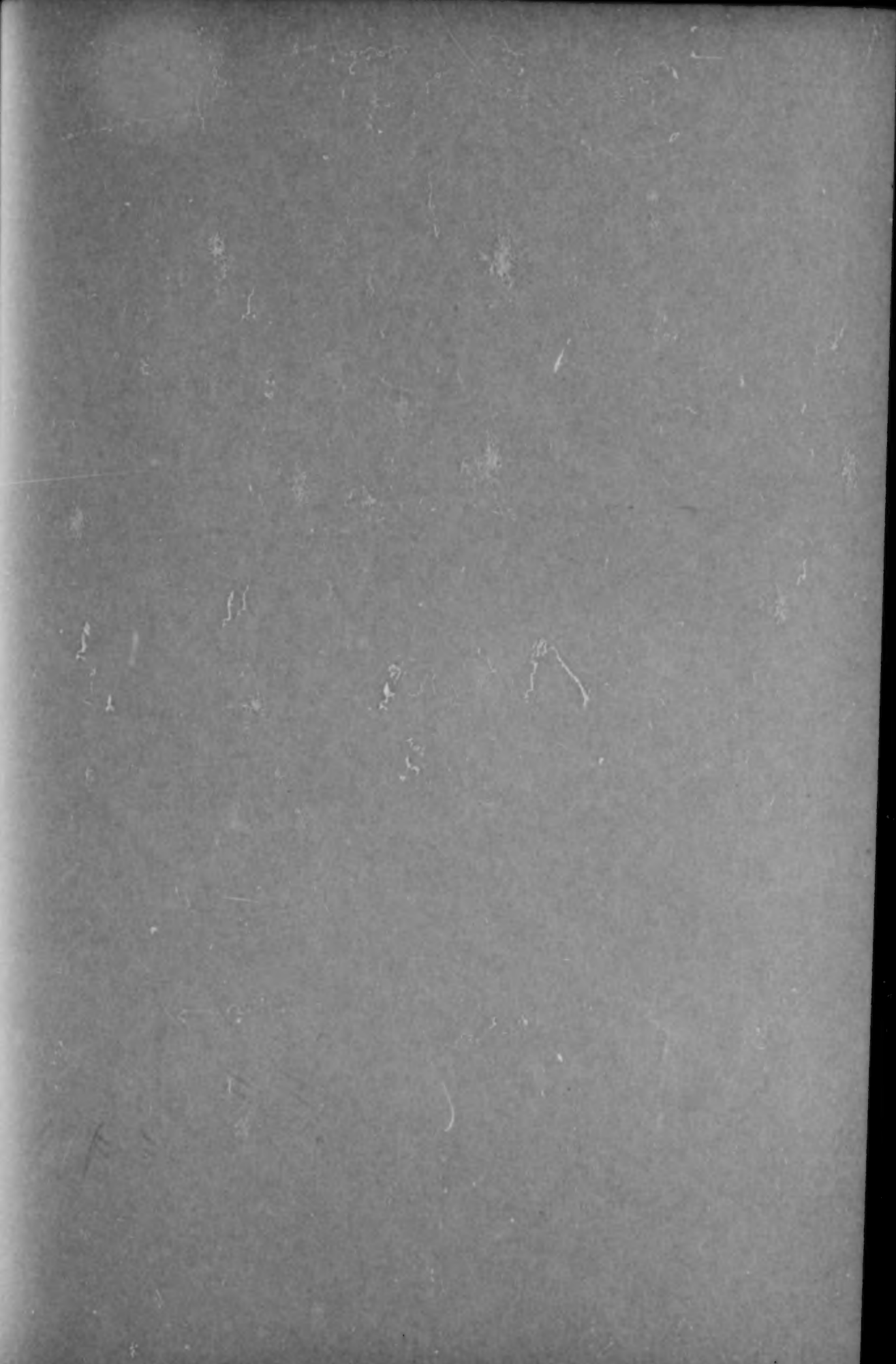
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Supreme Court, U.S.
FILED
OCT 29 1997
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No. 120 ORIGINAL

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

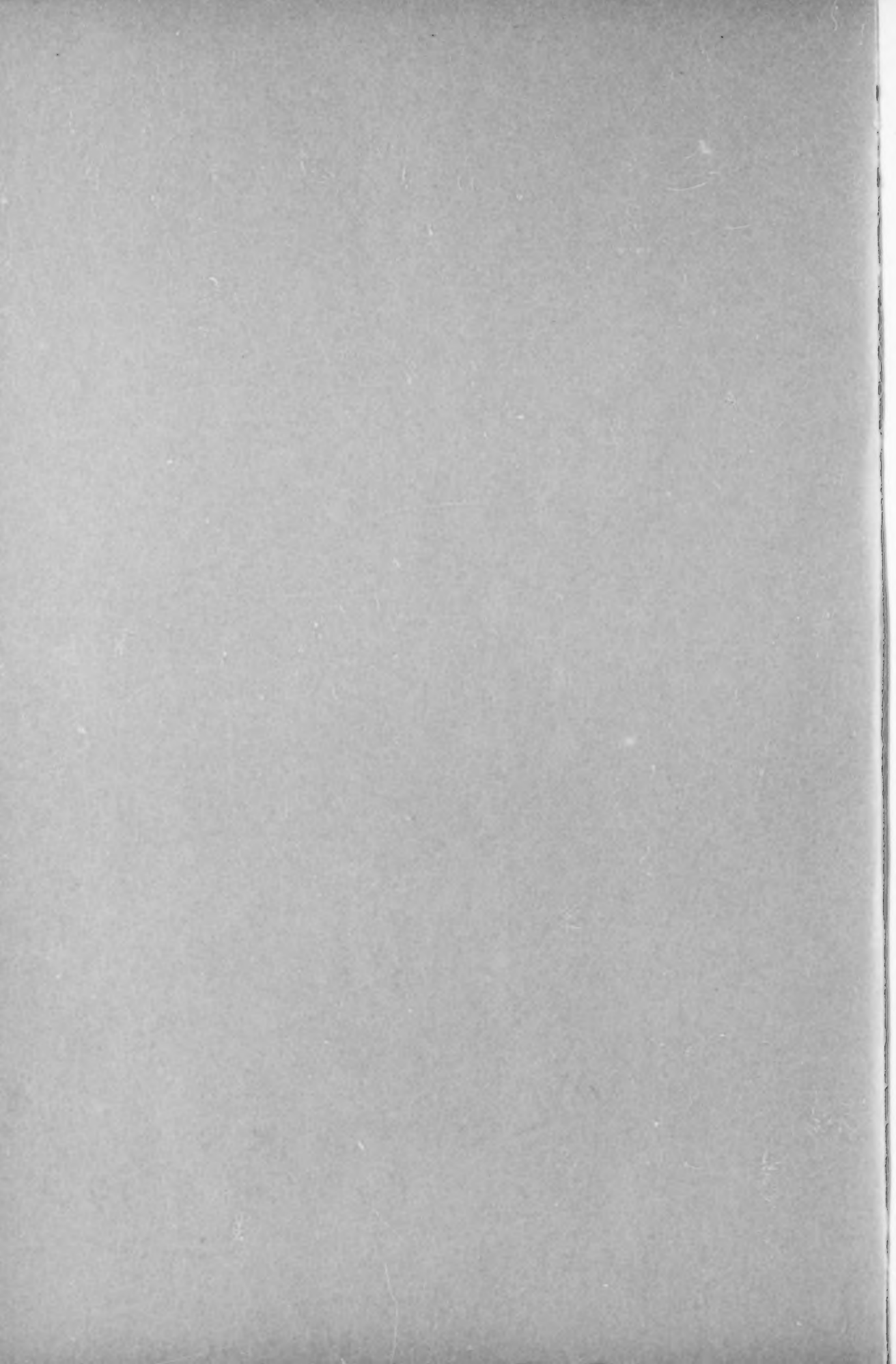
STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE OUT-OF-TIME
BRIEF OF *AMICUS CURIAE*
AND BRIEF OF *AMICUS CURIAE*
WESTERN MOHEGAN TRIBE & NATION
OF NEW YORK
IN SUPPORT OF NEITHER PARTY

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31pp



**MOTION FOR LEAVE TO FILE OUT-OF-TIME
BRIEF AMICUS CURIAE**

Western Mohegan Tribe & Nation of New York respectfully seeks leave of the Court to file the following *amicus* brief out-of-time on the ground that the applicant has been trying to do so since 6 February 1997 but only today was able to obtain counsel of record to perfect the filing, and unless the applicant does appear the Court may be suborned by the parties into complicity in genocide contrary to the law that the *amicus* has to place before the Court and that in the absence of the *amicus* will be concealed from the Court.

October 20, 1997. WESTERN MOHEGAN TRIBE & NATION
 OF NEW YORK

By:

RONALD ROBERTS
Sachem

BRUCE CLARK, LL.B., M.A., Ph.D.
Attorney General

/s/ Leon Greenberg
LEON GREENBERG
Counsel of Record



QUESTION FOR CONSIDERATION

Is it legal for the *amicus* to dispute the Special Master's assumption on page 4 of the *Final Report* that the Dutch Indian purchase of 1630 A.D. was valid and, if so, can the *amicus* seek, as a fourth sovereign body politic interested or affected, to avail itself of the remedy of third-party adjudication recognized by the *Order in Council (Great Britain)* of 9 March 1704 in the matter of *Mohegan Indians v. Connecticut*?

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BASIS FOR JURISDICTION IN THIS COURT

Pursuant to Rules 17, 24 and 33(1)(g)(xi) and 37.4 this brief is filed at the Exceptions Stage in response to the Final Report of the Special Master dated March 31, 1997 in the matter of *New Jersey v. New York*, 115 S. Ct. 309 (1994). *Amicus* claims to be an Indian "*domestic dependent nation*" part of whose allegedly unceded aboriginal territory is the subject of this action: Ellis Island. As a matter of law alone, if Ellis Island is indeed unceded it is automatically a "*Territory, or Possession*" of the United States within the meaning of Rule 37.4. Therefore, *amicus* is entitled to seek leave to file this brief by its "*Attorney General*" as of right and without the consent of the parties.

CONSTITUTIONAL PROVISIONS

Appendix "A." Page 5a.

STATEMENT OF THE CASE

Ellis Island is within the Hudson River drainage basin claimed by Western Mohegan Tribe & Nation of New York as set forth in Appendix "A."

The issue of outstanding aboriginal rights has not been adjudicated and is not *res judicata* relative to Ellis Island.

SUMMARY OF THE ARGUMENT

Appendix "A." Page 18a.

RELIEF REQUESTED

Wherefore the *amicus* respectfully asks the Court to stipulate that its judgment as between the interests of New Jersey and New York is without prejudice to the interests of the *amicus* as *cestui que trust* and of the United States of America as trustee.

October 20, 1997.

WESTERN MOHEGAN TRIBE &
NATION OF NEW YORK

By:

RONALD ROBERTS
Sachem

BRUCE CLARK, LL.B., M.A., Ph.D.
Attorney General

LEON GREENBERG
Counsel of Record

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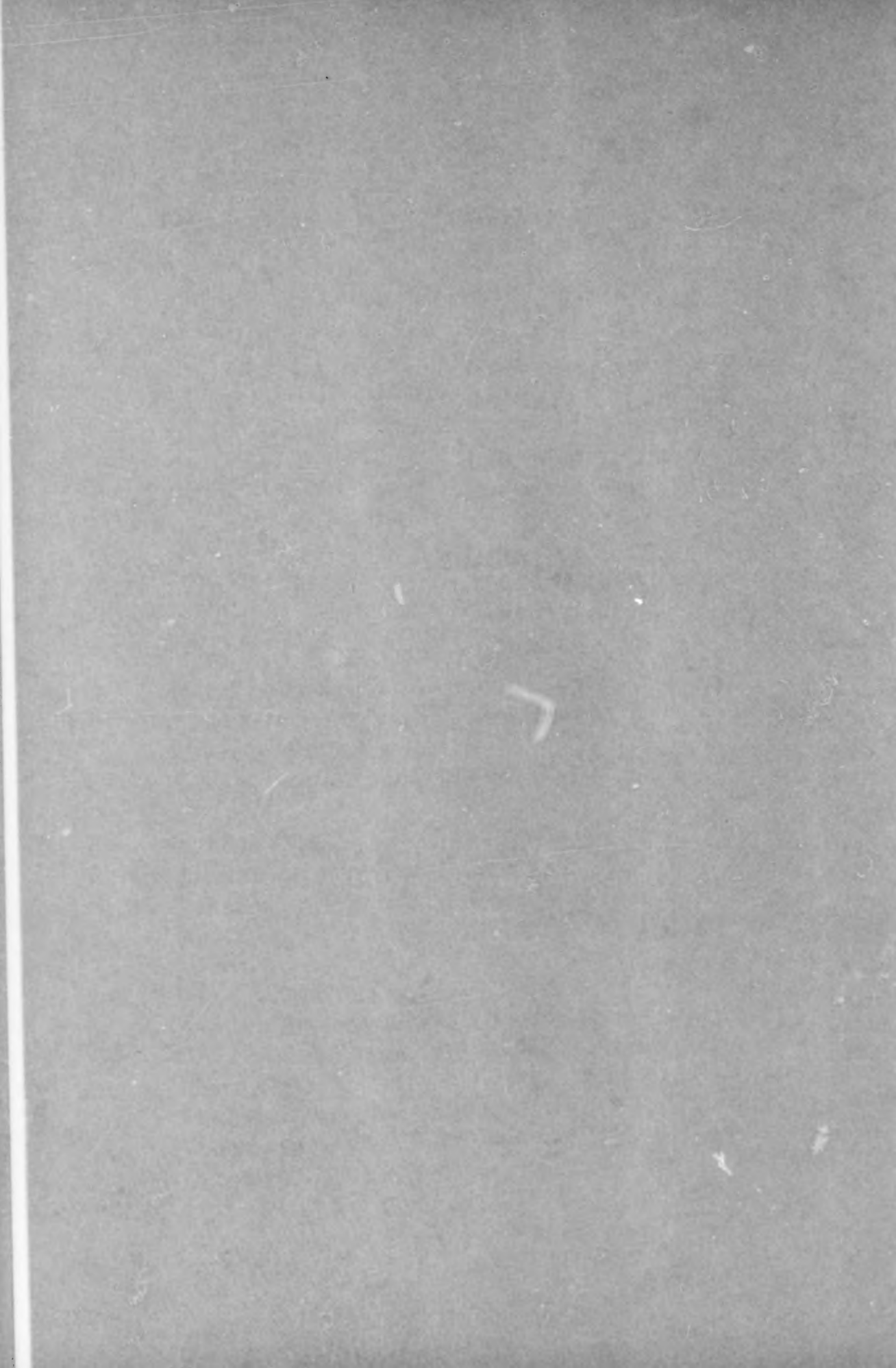
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Appendix



No. ____ ORIGINAL

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

WESTERN MOHEGAN TRIBE & NATION OF NEW YORK,

Applicant
(Plaintiff),

v.

UNITED STATES OF AMERICA,
STATE OF NEW JERSEY,
STATE OF NEW YORK,

Respondents
(Defendants).

MOTION SEEKING LEAVE TO INVOKE
THE COURT'S ORIGINAL JURISDICTION
SO AS TO OBTAIN DECLARATORY RELIEF
RELATIVE TO AN OUTSTANDING JURISDICTIONAL
CONFLICT BETWEEN THE PARTIES
AND BILL OF COMPLAINT

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APPLICATION FOR LEAVE

The applicant respectfully moves for an order granting to the applicant, as against the defendants, leave to appear as a plaintiff invoking the Court's original jurisdiction relative to the case or controversy defined herein and, if leave be granted, does file the following as the plaintiff's complaint.

October 20, 1997. WESTERN MOHEGAN TRIBE & NATION
OF NEW YORK

By:
RONALD ROBERTS
Sachem

BRUCE CLARK, LLB, MA, PhD
Attorney General

LEON GREENBERG
Counsel of Record

QUESTIONS FOR CONSIDERATION

Does the plaintiff suing by its sachem and attorney general as "*public Ministers*" within the meaning of Section 2.2 of Article III of the *Constitution, 1789* have *locus standi* to apply for an exercise of the Court's "*original Jurisdiction*" in relation to the conflicting claim to jurisdiction over the Hudson River drainage basin as between the plaintiff on the one hand, and the three defendants on the other hand?

If so, should the Court specifically exercise such "*original Jurisdiction*" specifically by declaring that the plaintiff still enjoys the legal remedy of third-party adjudication as settled by the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*, relative to the case or controversy defined herein.

Thirdly, does the President of the United States, pursuant to Section 2.2 of Article II of the *Constitution*, and regardless of the (purported) repeal of such Section by the *Act of March 3, 1871, c. 120, § 1, 16 Stat. 566*, still have jurisdiction to settle with the plaintiff, such as by signing a Treaty such as appears in the Appendix hereto, relative to any and all outstanding issues relating to the plaintiff's alleged Indian burden on titles in the Hudson River drainage basin?

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BASIS FOR JURISDICTION IN THIS COURT

The plaintiff asserts that relative to the Hudson River drainage basin it is the "*domestic dependent nation*" within the meaning of *Cherokee Nation v. State of Georgia*, 31 Peters 1, 16 (1831). As such, it is *prima facie* entitled to have in its employ "*public Ministers*" within the meaning of Section 2.2 of Article III of the *Constitution*. That section enacts that "*In all Cases affecting . . . public Ministers . . . and those in which a State shall be a Party; the Supreme Court shall have original Jurisdiction.*" Accordingly, by its sachem and its attorney general as "*public Ministers*," the plaintiff claims a right of access to the Court.

The Court's refusal to concede *locus standi* to the native plaintiff in the said case of *Cherokee Nation v. Georgia* is not necessarily determinative of the *locus standi* of the native plaintiff herein. The Cherokee Nation contended that it enjoyed "*foreign*" nation status. Here, in contrast, the Western Mohegan Tribe & Nation of New York eschews the claim to "*foreign*" nation status and, instead, relies upon a different clause of the *Constitution*, namely that dealing with bodies politic having "*Public Ministers*," which clause is not concerned with whether the body politic is foreign versus domestic, so long as it is a body politic.

The second distinguishing factor is the *Order in Council (Great Britain)* of 9 March 1704 in the matter of *Mohegan Indians v. Connecticut*. It was not addressed in *Cherokee Nation v. Georgia*, but will be here, and that instrument vests in this plaintiff a *sui generis* legal status and remedy, which this plaintiff asks this Court to consider.

CONSTITUTIONAL PROVISIONS

Magna Carta, 1215 established the constitutional law principle that no person or institution is above the law, not

even the head of the government itself and, *a fortiori*, not the courts provided by the government.

The papal bull *Sublimus Deus*, 1535 settled the natural and international law status of the natives as human beings invested, as such, with the strictly legal rights of "liberty" and "possession" as against the newcomers and their governments. It enacted:

We . . . consider, however, that the Indians are truly men . . . we define and declare by these letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that notwithstanding whatever may have been said to the contrary, the said Indians . . . are by no means to be deprived of their liberty or the possession of their property . . . ; and that they may and should, freely and legitimately, enjoy their liberty and possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.

An act for the prevention of frauds and perjuries, 9 Car. II, cap. 3 (1676) (Statutes at Large, Great Britain), established the constitutional law principle that no possessory interest in land, such as conveyed by Indian treaty, may be transferred except upon the written consent of the transferor. It enacted:

1. FOR prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subordination of perjury; be it enacted . . . all leases, estates, tenements or hereditaments, made or created by livery and seisen only, or by parol, and not put in writing; and signed by the parties so making or creating the same, or their agents thereunto lawfully

authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol lease or estates, or any former law or usage, to the contrary notwithstanding.

The Order in Council (Great Britain) of 9 March 1704 in the matter of *Mohegan Indians v. Connecticut* settled that in the absence of such a written and signed Indian treaty (a) that it was *ultra vires* colonial legislation unilaterally to revoke the natives' previously established rights of liberty and possession and (b) that the natives' legal remedy for attempts at revocation was independent and impartial third-party adjudication (as contrasted with litigation in the courts of the revoking government.) The order in council enacted:

Upon reading this day a Representation from the Lords Comm^{rs} of Trade and Plantations . . . for Erecting a Court within that Colony to do Justice in this matter . . . Her Majesty in Council approving the said Representation . . .

[which represented: We Consulted Your Maj^{ty}'s Attorney General thereupon, Who has reported to Us:

'That it doth not appear to him that the Lands now Claimed by the Indians were intended to pass or could pass to the Corporation of the English Colony of Connecticut, or that it was intended to dispossess the Indians, who before and after the Grant were the owners and Possessors of the same, and that therefore what the Corporation hath done by their Act aforementioned, is an apparent injury to the Indians, And that your Majesty, notwithstanding the Powers Granted to

that Corporation (there not being any words in the Grant to exclude your Majesty) may lawfully erect a Court within that Colony to do Justice in the matter, And in the Erecting of such Court may reserve an Appeal to your Majesty in Councill, and may command the Governor of that Corporation not to oppress those Indians or deprive them of their Right, But to do them Justice notwithstanding the Act aforesaid, made in Connecticut, to their prejudice, such Act he is of opinion, is illegal and void.']

Her Majesty in Councill approving the said Representation, is pleased to Order and it is hereby Ordered, That the said Lords Commissioners do prepare the Drafts of Letters for Her Majesty's Signature to those Governors together with the Minutes of a Standing Commission to be prepared by Mr Attorney General, as is provided by the said Representation.

The pre-Revolution constitutional restatement of aboriginal rights law made by the *Royal Proclamation of 1763* recognized and affirmed the aforesaid previously established rights and remedy. Specifically, paragraph 1 of part II of the 1763 restatement recognized and affirmed the 1704 order in council's enactment that the colonial courts had no territorial jurisdiction over yet unpurchased Indian territory. It enacted that the colonial courts' jurisdiction, in general, was to be:

. . . under such Regulations and Restrictions as are used in other Colonies. . . ; for which Purpose We have given Power under our Great Seal to the Governors of said Colonies respectively to erect and constitute Courts of Judicature and public Justice within our Said Colonies. . .

Paragraph 2 of part II of the 1763 restatement recognized and affirmed that territory is not subject to crown jurisdiction prior to purchase (aside, at least, from the jurisdiction to purchase). It referred to the granting power as relating to such lands:

. . . as are now or hereafter shall be in Our Power to dispose of.

Paragraph 1 of part IV of the 1763 restatement defined more specifically what paragraph 2 of part I referred to as lands not "now" subject to disposition but which "*hereafter shall be in Our Power to dispose of.*" Thus, paragraph 1 of part IV enacted that:

. . . the several Nations or Tribes of Indians . . . should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as not having been ceded to or purchased by Us are reserved to them or any of them as their Hunting Grounds.

Paragraph 2 of part IV of the 1763 restatement recognized and affirmed that:

. . . no Governor . . . do presume upon any Pretence whatever to grant Warrants of Survey or pass any Patents for Lands . . . upon any Lands whatever which not having been ceded to or purchased by Us as aforesaid are reserved to the said Indians or any of them.

Paragraph 3 of part IV of the 1763 restatement recognized and affirmed that:

We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves . . . upon any Lands within the Countries above described or upon any other Lands

which not having been ceded to or purchased by Us are still reserved to the said Indians as aforesaid forthwith to remove themselves from such Settlements.

Paragraph 4 of part IV of the 1763 restatement recognized and affirmed that:

. . . if at any Time any of the said Indians should be inclined to dispose of the said Lands the same shall be Purchased . . . at some public Meeting or Assembly of the said Indians to be held for that Purpose . . .

Paragraph 5 of part IV of the 1763 restatement recognized and affirmed that:

. . . the Trade with the said Indians shall be free and open to all our Subjects whatever provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor.

Paragraph 6 of part IV of the 1763 restatement recognized and affirmed one exception to the general rule precluding colonial court jurisdiction relative to the Indian territories. It enacted:

And we do further expressly enjoin and require all Officers whatever, as well Military as those employed in the Management and Direction of Indian Affairs within the Territories reserved for the Indians to seize and apprehend all Persons whatever who standing charged with Treason Misprisions of Treason Murders or other Felonies or Misdemeanors shall fly from Justice and take Refuge in the said Territory and to send them under a proper guard to the Colony where the Crime was committed of they stand accused in order to take their Trial for the same.

The said reference in paragraph 6 of part IV of the restatement to "*Misprisions of Treason*" is explained by Blackstone's *Commentaries*, 1825, IV: 74-5, 119-22:

Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consists in the commission of something which ought not to be done. . . . CONTEMPTS against the king's prerogative. As, by . . . disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, . . . or proclamation, . . . Disobedience to any of these commands is a high misprision and contempt; . . .

Thus, breach by a colonial official of the 1763 proclamation was *misprision of treason* without proof of *mens rea*.

Campbell v. Hall (1774), 98 English Reports 848, 895-9 (Judicial Committee of the Privy Council):

. . . laws of a conquered country continue until they are altered by the conqueror. . . . he [the king] can make none which are contrary to fundamental principles; . . . he cannot change the laws himself without consent of Parliament. . . . King [Magna Carta] John himself could not alter the grant of the laws of England. . . . The first and material instrument is the proclamation of the 7th of October 1763. See what it is that the King says, and with what view he says it; how and to what he engages himself and pledges his word, . . .

Sections 8.1 and 8.3 of Article I of the *Constitution*, 1789 invested in Congress jurisdiction to "*provide for the common Defence and general Welfare of the United States*" and "*To*

regulate Commerce with foreign Nations and among the several States, and with the Indian tribes."

Section 10 of Article I of the *Constitution, 1789* withheld from all States the jurisdiction to "*enter into any Treaty. . . .*"

Section 1.8 of Article II of the *Constitution, 1789* binds the President under his Oath or Affirmation of Office to "*preserve, protect and defend the Constitution of the United States.*"

Section 2.2 of Article II of the *Constitution, 1789* invested in the President jurisdiction "*to make Treaties, provided two thirds of the Senators present concur.*"

Section 2.2 of Article III of the *Constitution, 1789* enacted that "*In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party; the Supreme Court shall have original Jurisdiction.*"

Section 2.3 of Article III of the *Constitution, 1789* by necessary implication repealed the 1763 proclamation's sanctions for *Misprision of Treason* due to breach of the proclamation. It enacted:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.

Cherokee Nation v. Georgia, 31 Peters 1, 16 (1831) held:

They may, more correctly perhaps, be denominated domestic dependent nations."

Worcester v. Georgia, 6 Peter's 515, 541, 544, 546, 549, 560, 581 (1832) held:

[Discovery] could not affect the rights of those already in possession . . . It gave the exclusive right to

purchase, but did not found that right on a denial of the right of the possessor to sell . . . the exclusive right of purchasing such lands as the natives were willing to sell. . . . The Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent. . . . Have the numerous treaties which have been formed with them . . . been nothing more than an idle pageantry? . . . Except by compact we have not even claimed a right of way through Indian lands. . . .

Mitchel v United States, 9 Peter's 711, 745, 746, 749, 755 (1835)held:

[The Indian Nations of America have] a perpetual right of possession . . . [which] could not be taken without their consent . . . [because] The King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties. This brings into practical operation another principle of law settled and declared in the case of Campbell v. Hall that the proclamation of 1763, which was the law of the provinces ceded by the treaty of 1763, was binding upon the king himself, and that a right once granted by a proclamation could not be annulled by a subsequent. It cannot be necessary to inquire whether these rights secured by a treaty approved by a king are less sacred than under his voluntary proclamation. . . . The proclamation of 1763 was undoubtedly the law of the province till 1783: it gave direct authority to the Governors of Florida to grant crown lands, subject only to such conditions and

restrictions as they or the King might prescribe. These lands were of two descriptions: such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was perpetual possession, and his the ultimate reversion in fee, which passed by the grant, subject to the possessory right. . . This proclamation was also the law of all the North American colonies in relation to crown lands.

Section 2 of *Amendment XIV* ratified July 9, 1868 enacted that, for the purposes of ascertaining the franchise for Representatives, "*persons*" constitutionally is to be construed as "*excluding Indians not taxed.*"

The *Appropriations Act, 1871*, 25 US § 71, being the *Act of March 3, 1871*, c. 120, § 1, 16 Stat. 566 enacted:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired.

The *Convention for the Prevention and Punishment of the Crime of Genocide, 1948* enacted:

Article II. *In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to*

bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Article III. The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. Article IV. Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. Article VI. Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such other international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The Genocide Convention Implementation Act of 1987 (the Proxmire Act). P.L. 100-606. 100th Congress. 102 Stat. 3046 enacted:

§ 1091. Genocide "(a) BASIC OFFENSE.—Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—(1) kills members of that group; (2) causes serious bodily injury to members of that group; (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques; (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;

(5) imposes measures intended to prevent births within the group; or (6) transfers by force children of the group to another group; or attempts to do so, shall be punished as provided in subsection (b). (b)

PUNISHMENT FOR BASIC OFFENSE.—The punishment for an offence under subsection (a) is—(1) in the case of an offence under subsection (a)(1), a fine of not more than \$1,000,000 and imprisonment for life; and (2) a fine of not more than \$1,000,000 or imprisonment for not more than twenty years, or both, in any other case. (d) REQUIRED CIRCUMSTANCES FOR OFFENSES.—The circumstance referred to in subsections (a) and (c) is that—(1) the offense is committed within the United States; or (2) the alleged offender is a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)).

§ 1092. Exclusive remedies. Nothing in this chapter shall be construed as precluding the application of State or local laws to the conduct prescribed by this chapter, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding. § 1093. Definitions. As used in this chapter—(2) the term 'ethnic group' means a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage; (4) the term 'members' means the plural; (5) the term 'national group' means a set of individuals whose identity as such is distinctive in terms of nationality or national origins; (6) the term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent; (7) the term 'religious group' means a set of individuals whose identity as such is distinctive in

terms of common religious creed, beliefs, doctrines, practices, or rituals; and (8) the term 'substantial part' means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part."

STATEMENT OF THE CASE

Section 2 of *Amendment XIV* ratified July 9, 1868 confirmed that there remain two categories of American Indians:—"Indians not taxed" and, therefore, by necessary implication, *Indians taxed*. The distinguishing factor was, and remains, the existence of an Indian Treaty made by the President pursuant to Section 2.2 of Article II of the *Constitution, 1789*. As confirmed by *Worcester v. Georgia*, 6 Peter's 515, 581 (1832) "*Except by compact we have not even claimed a right of way through Indian lands.*" *A fortiori*, except by compact we can not (constitutionally) claim a right to tax Indians upon Indian lands. Taxation occurs upon the basis of federal and state law which itself is not applicable prior to treaty. Prior to treaty, Indians have no *constitutionally* enforceable right to federal or state benefits; but neither have they the burden of taxation. No taxation without representation.

Pending the contingency of treaty the Indians by operation of constitutional law are independent of the domestic legislation of the United States, but dependent upon the United States for protection from the imposition of jurisdiction by any foreign power. That is how the adjectives "*domestic*" and "*dependent*" are reconciled with their noun "*nations*" as used in *Cherokee Nation v. Georgia* with reference to native bodies politic that have not, by treaty, relinquished their aboriginally established independence (native sovereignty).

Three years after the 14th Amendment in 1868 reconfirmed the 1832 *Worcester* case's confirmation of the constitutional principle of Indian independence upon untreated-for lands, the *Appropriations Act of 1871* (unconstitutionally) pretended to void the constitutional category "*Indians not taxed*." It did this by enacting:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty.

In sum, the constitutional quality of being "*independent*" was (supposedly) repealed by ordinary domestic legislation, which is a legal impossibility. Ostensibly, the 1871 statute rendered *all* Indians and *all* their lands *prima facie* subject to domestic legislation of general application. This, then, is the origin the constitutional oxymoron of Congressional "*plenary*" jurisdiction relative to those American Indians who have not by treaty relinquished their aboriginally vested sovereignty as guaranteed under international and constitutional law. In the aboriginal rights and remedies context the adjective "*plenary*" is a recent invention based, ultimately, upon the patently unconstitutional *Appropriations Act of 1871*.

SUMMARY OF THE ARGUMENT

The presumptive existence since 1535 of the plaintiff's *prima facie* natural, international and constitutional law rights of "*liberty*" and "*possession*" and the related legal remedy of third-party adjudication is settled by the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*.

The post-Revolution constitutional law of the United States of America is consistent with the continuity of those rights and that remedy.

Modern federal Indian law, however, is premised upon the (erroneous) assumption that the federal *Appropriations Act of 1871* repealed the previously established constitutional law jurisdiction of the President to make treaties with the Indian nations. The assumption has not heretofore been challenged.

The assumption is erroneous because it assumes that federal law can repeal constitutional law.

That assumption inverts the order of rank and precedence that constitutes the essence of the rule of law. It suborns the President into breaching his obligation to uphold the Constitution as stipulated by Section 1.8 of Article II of the *Constitution, 1789*, specifically by requiring him to implement the 1871 federal law precluding Indian treaties over the conflicting 1789 constitutional law authorizing Indian treaties.

Sublimus Deus, 1535 recognized the plaintiff's right of liberty and possession pending treaty of purchase. The *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut* recognized the plaintiff's legal remedy of third-party adjudication. The *Royal Proclamation of 1763* confirmed both the right and the remedy, and added the crime of misprision of treason for interference. The *Constitution* repealed the crime of misprision of treason. *Cherokee Nation v. State of Georgia*, 31 Peters 1 (1831), *Worcester v. State of Georgia*, 5 Peters 1 (1832) and *Mitchel v United States*, 9 Peter's 711 (1835) settled that the Revolution and *Constitution* are without prejudice to the native interest as vested in the British era.

Since it was not in 1704 a party to *Mohegan Indians v. Connecticut*, the native nation plaintiff in *Cherokee Nation v. Georgia* in 1831 could not and did not cite and rely upon the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*. For this reason the

Cherokee Nation case is distinguishable in respects other than that bearing upon the general definition of "domestic dependent nation" status.

The Court has not revisited the court jurisdiction issue since the *Cherokee Nation* case of 1831; nor could the Court have repealed the previously established law relative to the plaintiff herein in particular even if it had revisited the issue: *Magna Carta*, 1215; E.V. Dicey, *Lectures*, 1920, p. 483.

Denial or frustration of the plaintiff's previously established legal remedy of third-party adjudication or arbitration arguably results in "genocide" within the meaning of the *Convention for the Prevention and Punishment of the Crime of Genocide*, 1948, art. 2(b), 3(e), 4 and 6 as confirmed by the *Genocide Convention Implementation Act of 1987 (the Proxmire Act)*, P.L. 100-606, 100th Congress, 102 Stat. 3046, § 1091(a).

The unchallenged *de facto* assumption of jurisdiction by United States courts in other cases in relation to other native nations is not relevant to the constitutional existence of this particular plaintiff's previously established *de jure* remedy.

The principle of the presumptive continuity of previously established rights and remedies is essential to the rule of law in the modern and future world: Smith, *Appeals to the Privy Council*, pp. 417-426.

In 1871 Congress (erroneously) assumed it had jurisdiction to repeal the previously established international and constitutional law. The *Appropriations Act* (unconstitutionally) purported to abolish the treaty process. The express abolition of the treaty process implicitly repealed the rights of liberty and possession and the remedy of third-party party adjudication that the treaty process existed to protect.

The repeal by ordinary domestic legislation of the previously established international and constitutional law axiomatically is *ultra vires* and unconstitutional. Therefore, the *Appropriations Act, 1871* could not, constitutionally, have repealed the plaintiff's aboriginal rights as a "*domestic dependent nation*" to "*liberty*" and "*possession*" relative to the plaintiff's untreated for aboriginal territory. Neither could it have repealed either the plaintiff's attendant aboriginal right to sell the land by treaty. Nor could it have repealed the plaintiff's legal remedy of third-party adjudication relative to the protection of any of those previously established aboriginal rights.

Neither could it have repealed the President's counterbalancing constitutional right under Section 2.2 of Article II "*to make Treaties, provided two thirds of the Senators present concur.*"

Nor could it have repealed the Supreme Court's "*original Jurisdiction*" under Section 2.2 of Article III to re-affirm the plaintiff's previously established remedy of third-party adjudication.

In sum, the jurisdiction of Congress under the references in Sections 8.1 and 8.3 of Article I to "*the common Defence and general Welfare*" and the power "*To regulate Commerce . . . with the Indian tribes*" could not have been employed by Congress, in virtue of the *Appropriations Act of 1871*, either to alter the balance of powers, or unilaterally to negate the plaintiff's previously established and constitutionally protected status as a "*domestic dependent nation*" entitled to treat with the United States as holder of the preemptive right of purchase relative to the plaintiff's "*liberty*" and "*possession*" on its aboriginal territory.

Subsequent to the year 1871 federal law in relation to the plaintiff has been structured upon the demonstrably false premise that the *Appropriations Act* repealed international and constitutional rights, the consequence of which *faux* repeal arguably has been and continues to be "genocide" of the plaintiff's constituents.

The plaintiff wishes to stress to the Court that it does not seek to have its cake and eat it too: it does not seek, and will not accept, benefits and programs under federal law as a dependent Indian community, while at the same time seeking to assert a measure of independence as a domestic dependent nation. Nor does the plaintiff wish to caste aspersions or gain compensation for genocide of the past—the objective here is the rehabilitation of the rule of law for the sake of the lands, waters and people of all races and ethnic backgrounds in the Hudson valley of America—for the future.

Finally, plaintiff has only to add, in the alternative, that even if the idea of Congressional "*plenary*" jurisdiction were capable of co-existing with the idea of constitutionally entrenched aboriginal rights on yet-unceded territory, the proposition that any particular set of such aboriginal rights, once vested, subsequently has been revoked by an act of Congress, would have to be supported by a clearly and plainly expressed Congressional legislative intent to repeal the particularly vested aboriginal rights in question. No such act of Congress exists, even arguably, relative to the *sui generis* aboriginal rights peculiarly vested in the plaintiff in consequence specifically of the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*.

RELIEF REQUESTED

Wherefore plaintiff respectfully asks the Court:

(a) to accept original jurisdiction; and

(b) to exercise such jurisdiction specifically by declaring that:

(i) the *Constitution, 1789* is without prejudice to the plaintiff's previously established legal remedy of third-party adjudication under the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut* relative to the resolution of the outstanding conflicting claims to jurisdiction, between the plaintiff on the one hand and the three defendants on the other hand in and over the Hudson River drainage basin in New York State; and

(ii) the President still has jurisdiction under Section 2.2 of Article II of the *Constitution* to enter into a treaty with the plaintiff notwithstanding the *Appropriations Act of 1871*.

October 20, 1997.

WESTERN MOHEGAN TRIBE &
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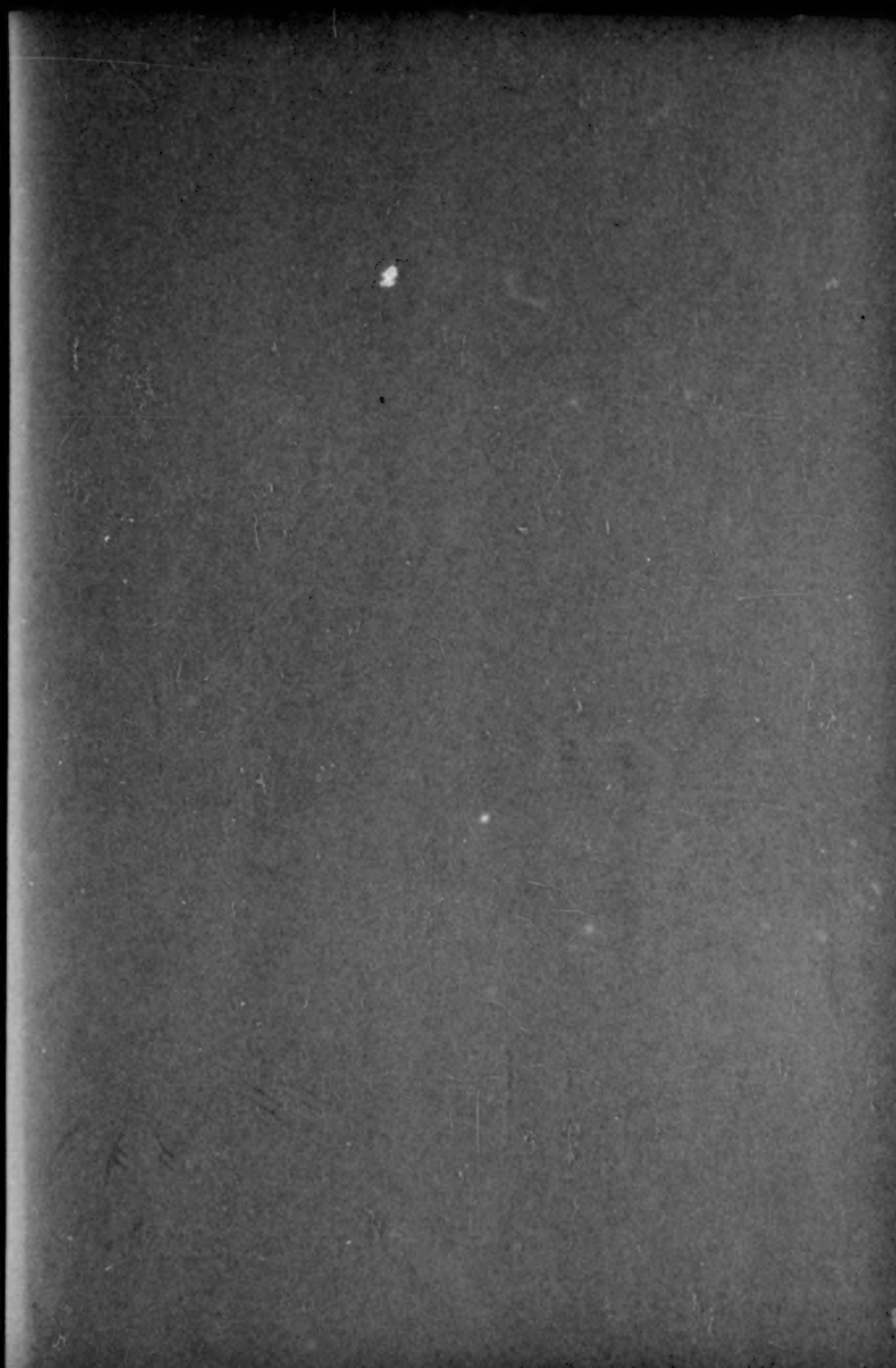
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22
IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF NEW YORK,
Defendant.

OFFICE OF THE SPECIAL MASTER

FINAL REPORT OF THE SPECIAL MASTER

MARCH 31, 1997

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SUPREME COURT, U.S.

PAUL R. VERKUIL
Special Master

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

No. 120, Original

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF NEW YORK,
Defendant.

OFFICE OF THE SPECIAL MASTER

FINAL REPORT OF THE SPECIAL MASTER

I. OVERVIEW AND PROCEDURAL HISTORY

A. Summary Of The Issues And Recommended Decision

Pursuant to the original jurisdiction of the Court, U.S. Const. art. III, § 2, 28 U.S.C. § 1251(a), the issues in this case are:

1. Is the State of New Jersey or the State of New York sovereign over the landfilled portion of Ellis Island (sometimes "the Island")?

2. To determine the answer to the issue posed in paragraph 1 above, what is the sovereign boundary between the States of New Jersey and New York (the "States") under the Compact of 1834?
3. If New Jersey is sovereign over the landfilled portion of Ellis Island, did New York nonetheless acquire sovereignty over the landfilled portion of the Island after 1834, either by prescription and acquiescence, or by laches?
4. If New Jersey vindicates her sovereign claim, how should the sovereign boundary on the present Island be drawn between the States given that survey information about the 1834 Island is inherently imprecise?

Pursuant to the authority accorded me as Special Master in this case, *see New Jersey v. New York*, 115 S. Ct. 309 (1994), I recommend the following:

1. The sovereign boundary of the States on Ellis Island lies at the division between New York's "original" Island (to the low-water mark, an area of just under 5 acres) and New Jersey's landfilled additions (an area of about 22.5), as more particularly set out in paragraph 4 below.
2. The sovereign boundary between the States is set out in Article First of the Compact of 1834, which draws a boundary line down the middle of the Hudson River, "of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay."
3. Since the Compact of 1834, New Jersey has exercised jurisdiction over her sovereign territory on Ellis Island, and she has not acquiesced in New York's isolated acts of prescription over the landfilled portions of Ellis Island.

4. In the interest of practicality, convenience, and fairness, New York's sovereign claim to the original Ellis Island is best vindicated by according her an area of land that estimates the size of the original Island to the low-water mark but reconstitutes it as an area including the entire Main Building and land immediately surrounding it, as more particularly set out in the survey to accompany the final recommendation to the Court.

B. Summary And Overview Of This Recommendation

The State of New Jersey initiated this original action on April 23, 1993 by her motion for leave to file a complaint against the State of New York.¹ In her pleadings, New Jersey asks the Court to adjudicate her sovereign boundary with the State of New York as it relates to Ellis Island under the Compact of 1834 ("Compact" or "Compact of 1834"), an agreement entered into law in both States and approved by the United States Congress as part of the Act of June 28, 1834. 4 Stat. 708 (1834); 1834 N.Y. Laws 8; 1833-34 N.J. Laws 118 (reproduced as App. A). The dispute is about those portions of the Island (roughly 24.5 acres of the total 27.5 acres of fast land) added by landfill since the Compact was drawn, nearly all of which was added by the United States during its use of the Island as the nation's principal immigration center in the late nineteenth and early twentieth cen-

¹ Mot. for Leave To File Compl., Compl., and Br. in Supp. of Mot. for Leave To File Compl. ("N.J. Mot. for Leave"; "N.J. Compl."; "N.J. Br. in Supp. of Mot. for Leave") (Apr. 26, 1993) (Docket Item No. ("DI") 1).

The United States Constitution provides that "[i]n all cases . . . in which a State shall be a party the Supreme Court shall have original jurisdiction." Art. III, § 2, cl. 2.

turies.² The present Island is over nine hundred percent larger than the fast land of the original Island.

New Jersey described her claim at the start of this case:

The State of New Jersey and the State of New York presently have a dispute concerning which state has jurisdiction over the approximate 24.5 acres of filled land of Ellis Island for the purposes of taxation, zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and public welfare laws, civil and criminal law, and for all other purposes related to the jurisdiction of any state.

N.J. Mot. for Leave ¶ 12. This is consistent with New Jersey's claims during trial. She opened her case by stating:

In this action, the State of New Jersey seeks a declaration that the portions of Ellis Island created by artificial fill are within the boundaries of New Jersey and subject to its sovereignty and jurisdiction. . . .

New Jersey's claims are based upon the Compact of 1834, an agreement that was reached by New

² Ellis Island was one of three islands in upper New York Bay, known as the Oyster Islands, during colonial times. It has been called many different names:

The 3-acre island now called Ellis was purchased from the Indians by the Dutch in 1630 to reward Michael Paauw (Paw) for shipping goods to the emerging colony. Various known as [Kioshk or] Gull Island to the [Mohegan] Indians, Dyre's or Bucking Island in the late 17th and early 18th century, and Gibbet or Anderson's Island in the pre-revolutionary period because of hangings of traitors and pirates there, its present name is derived from Samuel Ellis who had come into possession of the island by 1785.

Harlan D. Unrau, U.S. Dep't of Interior/Nat. Park Serv., Historic Resource Study: Ellis Island, Statue of Liberty National Monument, New York-New Jersey 2 (1984) (Def.'s Ex. ("DE") 74).

Jersey and New York to resolve a longstanding boundary dispute.

Trial Transcript ("Tr.") 7/10/96 at 10 (Mr. Yannotti for New Jersey).

New York initially opposed the jurisdiction of the Court over this action, asserting that the "claims by New Jersey are inaccurate, overstated, and insufficient to state a controversy which warrants an exercise of jurisdiction by this Court." Br. in Opp'n to Mot. for Leave to File Compl. ("Br. in Opp'n to Mot. for Leave") at 15 (June 24, 1993) (DI 2). In her answer, following the Court's assumption of jurisdiction, New York agreed that this dispute arose under the Compact of 1834. She stated:

While the provisions of the 1834 Compact established the general boundary line between the two States as the middle of New York Bay (Article I), that boundary was modified by several exceptions, both general and specific. Under Article Two, New York was to "* * * retain its present jurisdiction of and over Bedlow's and Ellis' islands * * *"; under Article Three, New York was to have "exclusive jurisdiction" over all waters of the bay and of the lands covered by said waters subject to certain rights of New Jersey. The Compact did not limit New York's sovereignty over Ellis Island to a fixed geographic dimension.

Answer ¶ 20 (July 15, 1994) (DI 8). New York agreed that "Ellis Island was approximately three acres in size when the boundary . . . was established by compact in 1834." *Id.* ¶ 2. At trial, New York set forth her modified theory, noting that

by virtue of the 1834 Compact, New York granted and New Jersey accepted a generous settlement where New Jersey received for the first time the right to own all of the property under the water

located on its side of the Hudson River and New York Bay and the right to govern exclusively its existing wharfs and docks extending *below the low water mark on its shoreline*, as well as those wharfs and docks which would be later added by New Jersey.

Tr. 7/10/96 at 74 (emphasis added) (Ms. Kramer for New York).

The States' dispute over Ellis Island occurs within the framework of a larger border controversy that has been simmering, and periodically boiling, since the mid-seventeenth century. Historic English land grants were the genesis for creating what became the States of New Jersey and New York. In 1664 King Charles II of England granted part of New Netherlands (named earlier by the Dutch) to James, Duke of York. The Duke of York that same year granted part of those lands, the area west of Long Island and Manhattan Island "bounded on the east part by the main sea, and part by Hudson's River" to Lord Berkeley and Sir George Carteret, the original proprietors of New Jersey. N.J. Statement of Undisputed Facts ¶¶ 1-2 (attached to N.J. Mot. for Summ. J.) (Mar. 5, 1996) (Pl's Ex. ("PE") 484) (citation omitted). The grant thus formed the colony—later the State—of New Jersey. *Id.* ¶ 2; *see also* Aff. of James P. Shenton for the State of N.J. in Supp. of Mot. for Summ. J. ¶ 10 (Mar. 5, 1996) (PE 487).³

New York and New Jersey seem to have always been at odds over whether the Duke of York intended the conveyance to be bounded by the Hudson River but not to include it, as New York argues, or whether the States were granted equal access to and sovereignty over the Hudson River, as New Jersey maintains. Before the

³ Mr. Shenton's affidavit in support of New Jersey's motion for summary judgment, described in the record as his "Trial Affidavit," is referred to as "Shenton Summ. J. Aff."

Compact of 1834 was signed, the States negotiated their boundary disagreement thrice—in 1807, 1827, and 1833. As the historical context is the fabric on which the Compact of 1834 was embroidered, this Report describes it in some detail. This background is crucial to understanding what was resolved in 1834 between the States' commissioners negotiating the boundary issues.

As much as any one historical event, the advent of the steamboat in the early nineteenth century—and its impact on commerce on the Hudson River and the Bay of New York—forced the States to resolve their conflicting claims. The necessity of delineating intrastate and interstate commerce led to New Jersey's suit against New York in this Court in 1829. *See New Jersey v. New York*, 28 U.S. (3 Pet.) 461 (1830). Ellis Island was not an issue in that suit, as New Jersey conceded in her Bill in Equity that the Island had become New York's by adverse possession:

[W]hile the said two states were Colonies, New York became wrongfully possessed of Staten island and the other small islands in the dividing waters between the two states . . . [which] had been since acquiesced in. . . . New York has no other pretense of title to said lands but adverse possession; that, as such possession has been uniformly confined in its exercise to the fast land thereof

In re Devoe Mfg. Co., 108 U.S. 401, 407 (1883) (describing bill in equity filed in the 1829-30 *New Jersey v. New York* case). The *New Jersey v. New York* lawsuit prompted the 1833 settlement negotiations between commissioners from New Jersey and New York that ultimately led to the Compact of 1834.

Article First of the Compact draws the boundary between the States down the middle of the Hudson River and the Bay of New York. Subsequent terms of the Compact declare some jurisdictional detours. It is undis-

puted that Ellis Island lies on New Jersey's side of the boundary set forth in Article First. Article Second of the Compact, however, retains for New York her "present jurisdiction" over Ellis Island; this phrase has caused much consternation. New York relies upon it to assert claims to the entire Island as presently configured. New Jersey does not contest that New York has sovereignty over Ellis Island as it existed at the time of the Compact, but she interprets "present" as a limitation on size (excluding the significant filled portions subsequently created by the United States) and also as a limitation on jurisdiction (which New York shared with the United States at the time of the Compact negotiations).

The dispute between the States is interwoven with the history of the United States's presence on Ellis Island. Even before the Compact was drawn, New York ceded jurisdiction of Ellis Island to the federal government for fortification purposes, subject to New York's continued jurisdiction to serve process. 1800 N.Y. Laws 7. New York conveyed title to the fast lands of the Island to the federal government in 1808. 1808 N.Y. Laws 278; *see also* Stipulated Facts ¶ 1 (July 10, 1996) (DI 338a). A reverter clause in the conveyance—that was never exercised by New York, *see* Tr. 7/10/96 at 82-83—provided that New York could reclaim the Island "if the Federal government no longer used it for safety or defensive purposes." 1808 N.Y. Laws at 279. The federal government then built Fort Gibson on Ellis Island before the War of 1812.

In the 1880s the federal government transferred Ellis Island to the Department of the Treasury for use as an immigration station. The federal government enlarged the Island by about 24.5 acres of landfill between 1890 and 1934, purchasing title to the tidal submerged lands around Ellis Island by way of a recorded deed from New Jersey in 1904. N.J. Stat. Ann. §§ 12:3-1, *et seq.* (West 1990). The main landfill additions took the form of one

expanded and two additional land masses, the former often known as "Island Number One" and the latter as "Island Number Two" and "Island Number Three." The three land masses were later consolidated into one by landfill.

In 1954 the federal government ceased using Ellis Island, either as an immigration station or detention center. After lengthy hearings on its future use, in which representatives from both States were actively involved, the United States included the Island within the Statue of Liberty National Monument, administered by the National Park Service. The United States has title to all but about 0.57 acres of the expanded Ellis Island.⁴

Two steps are required to draw the boundary on Ellis Island: first, determination of the sovereign boundary between the States as it was drawn in 1834; and second, resolution of the boundary on Ellis Island itself. New York's evolving theories of sovereignty in this case require that both of these boundaries be established. Initially,

⁴ A stipulation presented to the Special Master on the final day of trial states:

In response to a question posed by the Court inquiring whether the filled portions of Ellis Island extend beyond the bounds of the 1904 grant from New Jersey to the United States, the parties stipulate to the following:

1. .572 acres along the seawall on the northeast side of Ellis Island as it existed on October 13, 1995 are outside of the bounds of the 1904 grant.

2. As of October 13, 1995, the outside face of the seawall on the western portion of Ellis Island behind the area of the ferry house was approximately $\frac{1}{8}$ of an inch over the 1904 grant line on the northeastern corner of the seawall. As the seawall moves in a southwesterly direction its placement outside of the 1904 grant line gradually increases until it reaches a point where it is $\frac{57}{100}$ of a foot, or $6\frac{7}{8}$ inches, outside of the 1904 grant on the southwestern corner of the seawall.

Stipulation (Aug. 15, 1996) (DI 353a); *see also* Marchuk Aff. ¶ 11 (Aug. 7, 1996).

New York argued that under Article Second of the Compact she was given jurisdiction over the entire Ellis Island, by virtue of "present jurisdiction." Her theory was that New Jersey was granted only underwater property rights to the middle of the Hudson River and, once those were conveyed by deed in 1904 to the federal government, New Jersey forfeited all claims to the filled portions of the Island. By that theory, New Jersey's sovereign claims were limited by her shoreline, subject to wharfing-out rights.⁶

After trial, New York modified her theory. She argued that Article First of the Compact, which draws the boundary line down the middle of the Hudson River and New York Bay "except as hereinafter otherwise particularly mentioned," creates what amounts to a boundary theme in the Compact, and that, pursuant to that theme, boundary has five different meanings:

But New Jersey is wrong [that boundary equals sovereignty]. . . . The truth is, as the record shows, boundary does not have to equal sovereignty, and in this case, with reference to the Compact of 1834, it clearly does not rule along the 20 miles of its length.

In fact, a close examination of the 1834 Compact shows that there are five meanings of the term boundary as it is used in Article I, and that its meaning changes at various geographical points referred to in the Compact.

⁶ Actually, New York has described New Jersey's sovereign line as "extending below the low water mark on its shoreline." Tr. 7/10/96 at 74 (Ms. Kramer for New York); *see also* Tr. 8/15/96 at 4123. There is, of course, no possible line of legal demarcation between sovereigns "below the low water mark," but this description apparently tied into New York's theory of the boundary as being on New Jersey's eastern shore and based upon New Jersey's wharfing-out rights. New Jersey, according to that theory, can change the boundary at will by wharfing-out below the low-water mark without New York's consent (subject only to federal navigational laws). *See infra* Part IV.B.2.a.(2).

Tr. 8/15/96 at 4098 (Ms. Kramer for New York); *see* App. C (graphic representation of the five different meanings of boundary under the Compact of 1834, produced by New York during closing arguments at trial).

Under this interpretation of the Compact, the boundary line divides sovereign territory only at the very top of the Hudson River "from the Bergen Rockland border . . . to the tip of Manhattan." Tr. 8/15/96 at 4100 (Ms. Kramer for New York). In the section of the Hudson River encompassing Ellis Island, however, "by the express terms of the Compact, New York has exclusive jurisdiction over the whole of the Hudson River and New York Bay to the low water mark on the New Jersey shore." *Id.* Therefore, in analyzing the sovereign boundary under the Compact of 1834, New York in effect revived her pre-Compact theory of the boundary between the States—namely, that New York has dominion to the low-water mark of New Jersey's shore (or below the low-water mark, *see supra* note 5), including dominion over an Ellis Island of any size.

New York raises as an affirmative defense the doctrine of prescription and acquiescence. She argues that, even if New Jersey has legal claims to the filled portion of the Island, New York has nevertheless acquired sovereignty over the entire Ellis Island via prescription and acquiescence, or alternatively through laches.

I have concluded that New Jersey has established her territorial claims in the River and Bay and also to the landfilled portion of Ellis Island. My recommendation, therefore, is that Article First of the Compact sets a single sovereign boundary between the States, as opposed to a variable boundary;⁶ the remaining articles of the Com-

⁶ This Court earlier ruled in a unanimous opinion written by Justice Holmes that "boundary" divided the sovereign territory between New Jersey and New York in the Compact of 1834. *Cen-*

pact describe jurisdictional refinements (wherein each State was accorded some authority within the other's sovereign waters) consistent with Article First's overarching purpose of establishing a territorial division. In making this recommendation, I have recognized that this litigation must resolve not only the sovereign fate of Ellis Island, but also the lingering and in some ways more profound disagreement between the States over the boundary set by the Compact of 1834.

Sovereignty over the landfilled portion of Ellis Island is not determined by the equitable doctrines New York raised as affirmative defenses, largely because New York's efforts to establish prescription and acquiescence are undercut by a dominant reality: the federal government's almost continuous and uninterrupted ownership and control over Ellis Island pre-dating the Compact. I evaluated the evidence of prescription adduced at trial by New York in light of the pervasive federal presence. I find that New York did not meet her burden of proving she acquired the landfilled parts of Ellis Island by prescription and acquiescence during the critical period from 1890, when the federal government launched its landfill program on the Island to develop the immigration station, to 1955, when the federal government abandoned the station on the Island and the subject of future use was launched. After that date, New Jersey's non-acquiescence is beyond cavil.

Relying on the Compact, pre-Compact negotiations between the States' commissioners, and jurisprudence of the Court, I further find that New Jersey and New York intended the low-water mark to define the boundary on Ellis Island. Thus, my recommendation to the Court is that New York has jurisdiction over Ellis Island as it existed when the Compact was drawn, to the low-water

tral R.R. Co. v. Mayor of Jersey City, 209 U.S. 473 (1908). See *infra* Part IV.B.2.b. (2) (a).

mark thereof, while New Jersey has jurisdiction over the landfilled portion added to her sovereign territory by avulsive or sudden action, such as landfill, after the Compact was drawn. The evidence from trial suggests that any accretive or slow, natural changes to the Island from 1833 (when the Compact was drawn) to the 1890s (when landfill began) are negligible. *See* table *infra* Part VII.B.2. Thus, the focus is on the 1833 Island.

As set forth in Part VII below, I urge the Court take into account well-established and compelling practical and equitable considerations in dividing the States' sovereign territories on Ellis Island consistent with the analysis set out above. A solution that respects history and original bargains, but does not pretend that they can be applied mechanically one hundred and sixty years later, is the best outcome. The final stage in this proceeding will be to draw New York's portion of Ellis Island on a map, *see infra* Part VII.B.3., and then to have the States jointly survey that area so as to produce for the Court a metes and bounds description capable of immediate implementation once this proceeding is final.

C. Procedural History

1. *The Complaint And Responses*

New Jersey's prayer for relief asked the Court to enter a decree "declaring the true and correct boundary line between the State of New Jersey and the State of New York on Ellis Island." N.J. Compl. at 15. New Jersey requested that the Court declare the boundary "to be the former mean high water line of the original natural island, approximately 3 acres in size" leaving the "original island . . . within the territory and jurisdiction of the State of New York" and the rest of Ellis Island—the portion added by landfill—within New Jersey's "territory and jurisdiction." *Id.* New Jersey also asked the Court to

enjoin New York permanently “from enforcing its laws or asserting its jurisdiction within the filled portions of Ellis Island.” *Id.*

New Jersey described the questions she raised as “a serious and long-standing dispute between New York and New Jersey concerning the location of their common boundary on Ellis Island, in the Hudson River and Upper New York Bay.” N.J. Br. in Supp. of Mot. for Leave at 19. She complained that New York was “expand[ing her] governmental authority over the filled portion of Ellis Island” as a result of a fairly recent opinion issued by the United States Court of Appeals for the Second Circuit, which applied New York’s workers’ compensation law to the filled portions of Ellis Island. *Id.* at 20 (citing *Collins v. Promark Prods., Inc.*, 956 F.2d 383 (2d Cir. 1992)). New Jersey also pointed to development proposals for the filled areas of Ellis Island that might be funded by New York as necessitating “immediate resolution . . . of the boundary dispute.” N.J. Compl. at 3.

New York opposed New Jersey’s motion for leave to file a complaint. Br. in Opp’n to Mot. for Leave. She argued that New Jersey had failed to allege facts “sufficient to describe a serious current controversy.” *Id.* at 14. She described the “claims by New Jersey [as] inaccurate, overstated, and insufficient.” *Id.* at 15. She urged that judicial economy thus weighed in favor of denying the motion. *Id.* at 20-22. After reviewing the history of Ellis Island and its jurisdiction, New York argued that New Jersey had engaged in a “lengthy history of acquiescence to New York’s sovereignty,” *id.* at 16, and that New Jersey’s “alleged assertions of jurisdiction are facially insufficient to establish a claim over the Island,” *id.* at 18. In particular, New York argued:

Conspicuously lacking in this list [of assertions of jurisdictions by New Jersey] are instances of legis-

lative or sovereign action by that State over any portion of the Island remotely comparable to the electoral, judicial, tax, and other claims made by New York. These random and isolated claims of jurisdiction simply do not amount to an attempt by New Jersey "for many decades to resolve the issues concerning Ellis Island. . . ." They comprise instead stark evidence of the lengthy indifference of New Jersey to the Island in the face of extensive claims by New York during this period.

Id. (quoting N.J. Br. in Supp. of Mot. for Leave). Finally, New York denied allegations that she was expanding her jurisdiction over Ellis Island as a consequence of the *Collins* decision. *Id.* at 18-20.

The United States filed an amicus brief, also urging the Court to deny New Jersey's motion for leave to file a complaint. Noting that the "political boundary in the area of New York Bay and the Hudson River" had been in dispute between New Jersey and New York "[s]ince the founding of the United States," Br. for the United States as Amicus Curiae ("U.S. Br.") at 2 (Apr. 28, 1994) (DI 6), the United States argued that its own ownership and use of Ellis Island left "very little, if any, practical conflict between New York and New Jersey arising from activities on the island." *Id.* at 9. It pointed to the 1808 conveyance by New York of all her "right, title and interest" in Ellis Island, the 1880 cession by New York of her "'right and title' to and 'jurisdiction over'" submerged lands surrounding Ellis Island, among other islands, for wharfing, docking, and other purposes, and the 1904 conveyance by New Jersey for value of "'all [her] right, title, claim and interest of every kind'" to underwater land around Ellis Island. *Id.* at 5. The United States urged the Court to await "a more concrete controversy respecting some aspect of state authority." *Id.* at 13.

Over these objections, this Court granted New Jersey leave to file the complaint on May 16, 1994. *New Jersey v. New York*, 114 S. Ct. 1828 (1994). New York filed her answer on July 15, 1994. She admitted that the States entered into the Compact of 1834, establishing a boundary between them and assigning property and jurisdictional rights. She further admitted that in 1834 Ellis Island "was approximately three acres in size" and that subsequent expansion by artificial fill caused "the Island [to be] approximately 27.5 acres in size." Answer ¶ 2. New York claimed that the entire Island was within her own "territorial and sovereign jurisdiction," *id.*, and stated that her "Landmarks Preservation Commission [had] declared Ellis Island to be a New York City landmark on November 16, 1993," *id.* ¶ 3.⁷ New York defended her alleged jurisdiction over the Island under the terms of the Compact of 1834. She raised as an affirmative defense the doctrine of prescription and acquiescence. *Id.* ¶¶ 17-26.

This matter was referred to me as Special Master on October 11, 1994.⁸ I met with the parties on November

⁷ New Jersey filed her motion for leave to file a complaint against New York several months earlier, on April 26, 1993. I have excluded from discovery and trial any testimony concerning acts of prescription by either State subsequent to the launching of this litigation. It is my view that acts of prescription taken after the Complaint was filed are inherently self-serving and unreliable. *See* Tr. of Apr. 4, 1996 Prehearing Telephone Conference Concerning an Exchange of Letters between N.J. and N.Y. at 10 (Apr. 8, 1996) (DI 267).

⁸ The Court's Order referring the matter to me states in relevant part:

It is ordered that Paul Verkuil, Esquire, of Heathrow, Florida, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to

3, 1994 for a preliminary status conference, to tour Ellis Island and its facilities, and to develop the first litigation management order controlling the schedule in this case. *See* Tr. of Status Conference (Nov. 3, 1994) (DI 13); *see also* Litigation Management Order No. 1 (Dec. 2, 1994) (DI 19). During February 1995, with the States' approval, Saône B. Crocker, a partner in the District of Columbia law firm of Wright & Talisman, P.C., began to assist me.⁹

The States' counsel prosecuted their cases efficiently and effectively and it has been a pleasure to work with them. Pre-trial practice was conducted according to schedules contained in five additional litigation management orders¹⁰ that were developed with the States during regular status conferences held on Ellis Island.¹¹ The States pro-

call for. The Special Master is directed to submit such reports as he may deem appropriate.

New Jersey v. New York, 115 S. Ct. at 309.

⁹ This is an appropriate point for me gratefully to acknowledge the exemplary and indispensable service of Ms. Crocker on this case. Her experience in original cases has been invaluable. I also want to recognize the dedicated research efforts and other contributions of Ted Normand, Esq. (Univ. of Penn. Law 1995) and the organizational efforts at trial of Jonathan Boies (Tulane Law 1997).

¹⁰ Litigation Management Order No. 2 (May 15, 1995) (DI 85); Order Revising Litigation Management Order No. 2 (July 26, 1995) (DI 120); Second Amended Litigation Order No. 2 (Aug. 22, 1995) (DI 144); Litigation Management Order No. 3 (Sept. 29, 1995) (DI 165); Litigation Management Order No. 4 (Jan. 31, 1996) (DI 223); Litigation Management Order No. 5 (Mar. 22, 1996) (DI 249); and Litigation Management Order No. 6 (May 21, 1996) (DI 291).

¹¹ On the following dates, status conferences were convened among the parties and amici: Nov. 3, 1994 (Ellis Island) (DI 13); Mar. 16, 1995 (by telephone) (DI 52); Mar. 20, 1995 (Ellis Island) (DI 71); Apr. 25, 1995 (National Archives, Wash., D.C.) (DI 77); May 16, 1995 (by telephone) (DI 88); June 23, 1995 (Phil., Pa.) (DI 117); July 19, 1995 (Ellis Island) (DI 128);

ceeded to trial in just over two and a half years from the date we first convened.

After being denied intervention status at my recommendation, *New Jersey v. New York*, 115 S. Ct. 1996 (1995),¹² the City of New York actively participated in the case as an amicus. See Decision and Op. of Special Master on Mot. of N.Y. City for Leave to Intervene as Party-Defendant (Apr. 28, 1995) (DI 70) (inviting New York City to participate as an "active" amicus). Subsequently, I also granted the City of Jersey City's motion to participate in this case as an active amicus. Decision, Op. and Order of Special Master on Mot. of the City of Jersey City for Leave to Participate as Active Amicus Curiae (Nov. 21, 1995) (DI 192). In addition, at her request, I granted Hudson County, New Jersey amicus brief filing privileges; several other amici were granted permission to file briefs on the cross-motions for summary judgment and after trial. See Order Granting Mot. of Hudson County for Leave to File a Br. as Amicus Curiae (Oct. 19, 1995) (DI 180); Br. of Amici Curiae National Trust for Historic Preservation, N.Y. Landmarks Conservancy, Municipal Art Society of N.Y., Preservation League of N.Y. State and Historic Districts Council (Mar. 25, 1996) ("Preservation Amici Br.") (DI 256).¹³

Aug. 17, 1995 (Ellis Island) (DI 149); Nov. 1, 1995 (Ellis Island) (DI 189); Dec. 4, 1995 (Ellis Island) (DI 219); Jan. 30, 1996 (Ellis Island) (DI 222a); Feb. 27, 1996 (by telephone) (DI 238); Mar. 20, 1996 (by telephone) (DI 248); Mar. 11, 1996 (Ellis Island) (DI 261); Apr. 4, 1996 (by telephone) (DI 267); Apr. 11, 1996 (Ellis Island) (DI 271); Apr. 18, 1996 (by telephone) (DI 277); Apr. 25, 1996 (Ellis Island) (DI 288); and May 31, 1996 (U.S. Supreme Court) (DI 303).

¹² The Court had earlier referred to me New York City's Motion to Intervene. See *New Jersey v. New York*, 115 S. Ct. 1352 (1995).

¹³ Hudson County and the Preservation Amici were permitted to file briefs but, unlike New York City and the City of Jersey City,

2. *The Cross-Motions For Summary Judgment*

Following more than a year of factual and expert discovery, both New Jersey and New York filed motions for summary judgment.¹⁴ The issues raised by these motions were fully briefed and argued. I held a hearing on summary judgment on Ellis Island on April 11, 1996. *See* Tr. of Summ. J. Hr'g ("Hr'g Tr.") (Apr. 11, 1996) (DI 296).

New Jersey supported her summary judgment claims with affidavits and relied heavily on the interpretation of the Compact of 1834 by New York's high court in 1870. *See People v. Central R.R. Co.*, 42 N.Y. 283 (1870), *appeal dismissed*, 79 U.S. (12 Wall.) 455 (1872). That case gave priority to Article First's establishment of the boundary, holding that the New York courts do not have jurisdiction over the wharves, piers, docks, and other improvements on the New Jersey side of the Hudson River because New York's jurisdiction over the waters under Article Third of the Compact of 1834 is "qualified and limited." *Id.* at 300. The court concluded that "[i]t clearly could not have been the intention in these words [of Article Third] to re-cede to New York what had just been relinquished in respect to the boundary between the two States in the first article or to nullify the force of such article." *Id.* at 296.

they were not granted the privileges of "active" amici, which included leave to depose or cross-examine witnesses, file motions, or deliver oral argument at hearings or at trial.

¹⁴ N.J. Mot. for Summ. J.; Shenton Summ. J. Aff.; Castagna Aff. (Mar. 5, 1996) (DI 237); Br. of N.J. in Supp. of Its Mot. for Summ. J. ("N.J. Br. for Summ. J.") (Mar. 5, 1996) (DI 237); N.Y. Notice of Mot. (Mar. 5, 1996) (DI 235); Aff. of Judith T. Kramer in Supp. of N.Y.'s Mot. for Summ. J. ("Kramer Aff.") (Mar. 5, 1996) (DI 235); Aff. of Michael R. Finamore in Supp. of N.Y.'s Mot. for Summ. J. ("Finamore Aff.") (Mar. 5, 1996) (DI 235); Mem. of Law in Supp. of N.Y.'s Mot. for Summ. J. ("N.Y. Mem. for Summ. J.") (Mar. 5, 1996) (DI 235).

New Jersey argued:

[I]n 1870 . . . the highest state court of New York [held that] . . . the language of Article 3 when it spoke of jurisdiction was not [meant to say] sovereignty, the full range of governmental authority.

What [the framers of the Compact were] speaking to . . . was the limited jurisdiction conferred for police and sanitary jurisdiction and to promote the interest of . . . navigation. . . .

Hr'g Tr. at 15-16 (Mr. Yannotti for New Jersey).

New Jersey also relied on the opinion by Justice Holmes in *Central Railroad Co. v. Mayor of Jersey City*, in which this Court resolved the continuing tax dispute addressed in the 1870 New York State court litigation, holding that New Jersey has authority under the Compact to impose a tax on the underwater lands on her side of Article First's boundary line. Justice Holmes interpreted "boundary" in Article First to mean "sovereignty," an analysis New Jersey has promoted in this case and one which New York has vehemently disputed.

Relying on this Court's holding in *Georgia v. South Carolina*, 497 U.S. 376 (1990), New Jersey argued that the landfill added by the federal government after 1890 caused the size of Ellis Island to be changed by avulsion, not accretion. Under the common law, avulsion does not change the boundary line that was drawn on Ellis Island in 1834 under Article Second of the Compact, according to which New York retained whatever jurisdiction she still had over the original 1833 Island. *See* N.J. Br. for Summ. J. at 53; Hr'g Tr. at 78.

New Jersey also highlighted several instances in which the federal government recognized the filled portions as a part of New Jersey's sovereign territory. She pointed, for example, to a 1904 legal opinion by United States Attorney General William Henry Moody at the time

the United States purchased the tideland deed from New Jersey to start the landfill; a 1963 legal opinion by the General Services Administration; a 1968 National Park Service ("NPS") preliminary master plan for the use of Ellis Island and subsequent statements by the NPS; and the 1992 position taken by the United States in the *Collins* litigation with respect to Article Second of the Compact. See N.J. Br. for Summ. J. at 55-58. New Jersey thus implied that the federal government had bolstered repeatedly her interpretation of the terms of the Compact of 1834.

With regard to New York's affirmative defense of prescription and acquiescence, New Jersey took the position that New York "cannot establish that it has been in possession and control of the filled portion of Ellis Island" by virtue of New York's two-time cession of jurisdiction to the United States. Hr'g Tr. at 76. Further, she argued that her own assertion of rights or prescriptive acts and long series of acts of non-acquiescence "created a live and standing dispute." *Id.* at 95-106. Affidavits by two of New Jersey's expert witnesses, the historian for the Immigration and Naturalization Service, Marian L. Smith, and historian James P. Shenton, described New Jersey's acts of non-acquiescence. See Aff. of Marian L. Smith for the State of N.J. ("Smith Summ. J. Aff.") (Mar. 26, 1996) (PE 490);¹⁵ Shenton Summ. J. Aff. Both affiants concluded that New Jersey repeatedly asserted her sovereignty over the filled portions of Ellis Island from 1890 to the present. See Smith Summ. J. Aff. ¶¶ 72-74, 78, 135-36; Shenton Summ. J. Aff. ¶¶ 7, 19-20, 24, 30-31, 49-53, 55, 79-80, 92.

In her cross-motion for summary judgment, New York interpreted the Compact of 1834 to have separated property rights from jurisdiction, giving New Jersey only the former on her side of Article First's boundary line; this,

¹⁵ Ms. Smith's summary judgment affidavit is also referred to in the record as her trial affidavit.

declared New York, was the “‘great object’” of the Compact. N.Y. Mem. for Summ. J. at 41. She argued that “present jurisdiction” in Article Second qualified only the scope of New York’s sovereignty, not its geographical limits. *Id.* at 50; *see also* Preservation Amici Br. at 22-23 (present jurisdiction was meant to be “‘coterminous’ with the entity of Ellis Island, no matter how its physical boundaries might change over time”).

New York relied on case law in her favor, especially the New Jersey Supreme Court case, *State v. Babcock*, 30 N.J.L. 29 (Sup. Ct. 1862), where Justice Elmer, one of New Jersey’s commissioners in the negotiations of the Compact, opined:

Although, for some purposes, New Jersey is bounded by the middle of the Hudson river, and the state owns the land under the water to that extent, exclusive jurisdiction, not only over the water, but over the land to the low water line on the Jersey shore, is, in plain and unmistakable language, granted to, or rather acknowledged to belong to the state of New York.

Id. at 31-32. New York also pointed to the recent decision in the *Collins* case, in which the Second Circuit held that New York’s workers’ compensation laws applied to the filled portions of Ellis Island, which “remains a part of New York by acknowledgement of the government and without objection (except in this case) by New Jersey.” 956 F.2d at 387.

As to this Court’s *Central Railroad* case, New York contended that Justice Holmes erred in equating “boundary” in Article First with “sovereignty.” New York declared:

New York had sovereignty all the way to the high water mark on the Jersey shore. [Justice Holmes] was wrong, therefore, in saying that boundary means

sovereignty. . . . [Under the Compact] New York retained jurisdiction and sovereignty over the western side of the Hudson River in exchange for which New Jersey got jurisdiction over its own docks, wharves and piers, riparian rights and the right to regulate the fisheries on its side of the border.

Hr'g Tr. at 29 (Mr. Hughes for New York). New York pointed out that, in any event, the *Central Railroad* Court did not have the benefit of New York before it as a party nor a full briefing of Compact negotiations or subsequent history. N.Y. Mem. for Summ. J. at 53.

New York documented her acts of prescription over the Island, including application of her wage levels and laws, workers' compensation laws, safety regulations and specifications, judiciary systems, police services, fire services, and health services. *See id.* at 18-34. New Jersey acquiesced in her prescriptive acts, concluded New York, "and, most importantly, [New Jersey] has never suffused the hearts of every immigrant whose first, precious step onto United States soil caused a tear to spill on the card pinned to his or her lapel which read . . . destination 'New York.'" *Id.* at 68-69.

I denied both motions for summary judgment, without prejudice to renewal at trial, for three reasons. First, many material facts were still in dispute, as ultimately evidenced by post-trial papers. After trial, the States proposed a total of 1,017 findings of fact. *See* New York's Proposed Findings of Fact ("NYPFF") (Oct. 3, 1996) (DI 365); New Jersey's Proposed Findings of Fact ("NJPF") (Oct. 12, 1996) (DI 366). Prior to trial, they stipulated to eighteen. *See* Stipulated Facts (July 10, 1996) (DI 338a).

Not only had there been little resolution of material facts at that time, but the Court's referral of the case to me compelled a careful examination of all factual issues. *Cf. California ex. rel. State Lands Comm'n v. United*

States, 457 U.S. 273, 278 (1982) (no special master appointed because “[n]o essential facts” were disputed); *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966) (no special master appointed because “no issues of fact were raised in the complaint”). The Court’s jurisprudence teaches that, in original jurisdiction cases, full and liberal factual development is important because of the lofty historical, territorial, and financial implications of these cases to the states involved. See *United States v. Texas*, 339 U.S. 707, 715, *modified*, 340 U.S. 848 (1950). I noted that the Court had found a case and controversy, taken jurisdiction, and assigned the case to a Special Master. I thus inferred that the Court believed that factual issues were raised. New York’s theory of the case in her motion for summary judgment had not changed from her brief opposing jurisdiction, and those factual issues persisted. See Interim Op. of Special Master on Cross-Mots. for Summ. J. (“Interim Op.”) at 34-37 (May 9, 1996) (DI 286).

Under the prevailing standards articulated in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248-50 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990), I concluded that “several of the outstanding fact, or mixed fact and law, questions may be reasonably resolved in favor of either party and, indeed, they have been in the past.” Interim Op. at 39 (citations omitted).

Second, the Compact of 1834 appeared ambiguous on its face. Not only were New Jersey and New York deducing exactly opposite facial meanings from its terms, but there were counterpoint interpretations from each State’s courts. As I saw it, an evidentiary proceeding would introduce extrinsic evidence of Compact history and subsequent Compact operations that would help to clarify its terms.

The parties even disagreed about the nature of the litigation. New Jersey's complaint raised a boundary issue, but during the hearing on summary judgment, New York City, arguing on behalf of New York, asserted that it was a property, not a boundary case:

It is not conceptually [a boundary case]. It has to do with New York territory that happens to be in the middle of New Jersey territory. It is boundary in the sense of the geographical limitations of a property like an individual riparian property. It is not boundary in the sense of the center line between two states.

Hr'g Tr. at 45-46 (Ms. Helmers, for Amicus New York City arguing for New York).

Finally, although I found New Jersey's evidence of non-acquiescence to be fairly convincing at the time of the summary judgment hearing, I ruled that New York should nevertheless have the opportunity to develop her evidence of prescription during trial. In particular, New York had at that time submitted only post-complaint evidence of her taxing activities on Ellis Island, *see* *Finamore Aff.*, which I advised her would be irrelevant. I noted that she should have the opportunity to introduce timely tax evidence at trial. *See* *Interim Op.* at 24 n.85, 31. I further concluded with respect to New York's affirmative defense of prescription and acquiescence that New York "will be challenged [during trial] to defend her theory that, despite numerous legislative, administrative and public efforts over the decades to settle the border issues, New Jersey has acquiesced by failing to file a lawsuit before 1993." *Id.* at 31. I denied both States' motions for summary judgment on May 9, 1996.

3. *The Trial*

Following a pre-trial conference held in the West Conference Room of the United States Supreme Court on

May 31, 1996, the States expeditiously prepared for trial. They filed a Joint Pre-Trial Order (July 8, 1996) (DI 337), which detailed their intended cases, listed proposed stipulated and contested facts, presented the credentials of their intended expert witnesses, and generally set forth the plan for trial.

Pursuant to Litigation Management Order No. 6, by June 10, 1996 both parties had filed various pre-trial motions. New York requested that she be permitted to conduct a voir dire of expert witnesses at trial. *See* Letter from Judith T. Kramer to Paul R. Verkuil (June 4, 1996) (DI 304). New York also objected to the qualifications or scope of expertise of certain of New Jersey's expert witnesses. In particular, New York objected to certain testimony of Ms. Smith, Dr. Shenton, and Mr. Castagna as speculative or irrelevant. New York concluded:

It is New York's understanding that the purpose of this hearing is to develop as full a factual record as possible for the United States Supreme Court. Accordingly, New York does not believe that preclusion is an appropriate remedy in most instances. However, if the Court is inclined to grant New Jersey's application for preclusion in whole or in part, New York's application for preclusion should also be granted.

Letter from Judith T. Kramer to Paul R. Verkuil Regarding Objections to Expert Ops. at 4-5 (June 10, 1996) (DI 311). New York also objected to certain of New Jersey's documents on various grounds. Letter from Judith T. Kramer to Paul R. Verkuil Regarding Objections to Docs. (June 10, 1996) (DI 311).

New Jersey had earlier moved to exclude portions of expert testimony to be presented by New York experts, Drs. Hershkowitz and Kraut and Mr. Unrau. New Jersey's

bases for requesting exclusion included relevancy and speculation. Mot. of the State of N.J. to Exclude or Limit Expert Test. and to Bar the Admis. of Test. Concerning the Collection of Taxes by the State of N.Y. or the City of N.Y. (Mar. 5, 1996) (DI 237). New Jersey renewed that motion on June 10, 1996 and further objected to the testimony of Dr. Squires as beyond the scope of his expertise. Proposed Joint Final Pre-Trial Order at 14 (June 10, 1996) (DI 309). In addition, New Jersey raised objections to the testimony of several of New York's proposed fact witnesses, *id.* at 10-11, and to certain of New York's documents, *id.*, Ex. E at 3.

In response to those motions or requests I issued an order and memorandum on pre-trial issues. *See* Order and Mem. of Special Master on Pre-Trial Issues (June 21, 1996) (DI 323). I agreed to permit a focused voir dire of the expert witnesses during trial and afforded the parties an opportunity to submit additional qualifications for their expert witnesses before trial. I further denied all motions or requests to limit expert testimony and denied all objections to the testimony of fact witnesses or to documents, subject to renewal at trial.

Shortly before trial, New York requested that she be permitted to amend her pleadings to add the affirmative defense of laches. New York had not raised the defense in her answer, during pre-trial proceedings, or in her motion for summary judgment. I noted this in my interim opinion denying the cross-motions for summary judgment, stating:

The defense of prescription and acquiescence appears to be a fallback position for New York should she not prevail on her interpretation of the Compact of 1834. At this juncture, her arguments would benefit from stronger references to the relevant facts and law. Finally, she should distinguish between

acquiescence and laches, as this Court has held that laches is inapplicable to cases of original jurisdiction.

Interim Op. at 51 (citing *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991) (where the Court held the defense of laches inapplicable to boundary disputes in cases of original jurisdiction)).

In response to my request that she distinguish the defense of laches, New York requested that she be permitted to add that defense in the final joint pre-trial order which New York believed “supersedes the pleadings previously filed in this case.” N.Y.’s Responses to N.J.’s Objections at 3 (June 12, 1996) (DI 315). New York relied on *Kansas v. Colorado*, 115 S. Ct. 1733 (1995) (an interstate river compact case), which noted that the question of whether laches would apply in a case involving “the enforcement of an interstate compact” was unresolved. *Id.* at 1742.

Although I did not permit New York formally to raise the defense of laches before trial, I did admit evidence of prejudice introduced by New York’s experts during trial, *see, e.g.*, Tr. 7/25/96 at 1952-61; Tr. 7/30/96 at 2477-78, and most of the evidence supporting an affirmative defense of laches entered the record as part of New York’s proof of acquiescence. Thus, in addition to my legal conclusions, the Court has the factual record it needs to apply the doctrine of laches, should it decide to do so.

Trial was conducted for twenty-three days between July 10 and August 15, 1996. Two days of trial were held on Ellis Island to accommodate those witnesses whose testimony benefitted from being on the scene.³⁶ New Jersey

³⁶ The trial created its own historic legacy, as it was apparently the first to be held in the stately venue of the West Conference Room of the United States Supreme Court as well as the first trial held on Ellis Island itself.

proffered the testimony of three fact witnesses and five expert witnesses, including two historians and three scientists. New York put forward eight fact witnesses and five experts—three historians and two scientists. The biographical data for the expert witnesses is contained in the Final Joint Pre-Trial Order.

The trial record yielded over four thousand pages of testimony and just under two thousand documents.

4. *Post-Trial*

The parties submitted memoranda of law and proposed findings of fact. *See* Post-Trial Br. of N.J. ("N.J. Post-Trial Br.") and NJPFF (Oct. 12, 1996) (DI 366); N.Y.'s Post-Trial Mem. of Law ("N.Y. Post-Trial Mem.") and NYPFF (Oct. 3, 1996) (DI 365). Two amicus briefs were filed in support of New York, by the City of New York and by the Preservation Amici respectively. *See* Post-Trial Br. of the City of N.Y., as Amicus Curiae, in Supp. of the State of N.Y. ("The City Post-Trial Br.") (Oct. 12, 1996) (DI 367); Post-Trial Br. of Amici Curiae National Trust for Historic Preservation, N.Y. Landmarks Conservancy, Municipal Art Society of N.Y., Preservation League of N.Y. State and Historic Districts Council ("Preservation Amici Post-Trial Br.") (Oct. 12, 1996) (DI 368). Both New Jersey and New York filed reply memoranda on October 24, 1996. *See* Reply Br. of N.J. ("N.J. Reply") (Oct. 24, 1996) (DI 369); N.Y.'s Reply Mem. of Law ("N.Y. Reply") (Oct. 24, 1996) (DI 370).

In a telephone conference with the parties on November 23, 1996, I encouraged them to meet for settlement negotiations. I then advised the parties that I would continue to prepare this report pending their meeting. Letter from Paul R. Verkuil to Peter Verniero, Attorney General of N.J. and Dennis C. Vacco, Attorney General of N.Y. (Dec. 3, 1996) (DI 375a). Counsel for the parties ad-

vised me in a telephone meeting on January 24, 1997 that the Attorneys General and counsel from both States discussed settlement options on January 15, 1997, but settlement would not be possible.

D. The Role Of The Special Master

In conducting the pre-trial proceedings and the trial itself, and in offering my recommendations to the Court in this report, I was guided by the following principles.

1. Approach To Procedural Matters

With respect to the minor discovery disputes that arose before trial and the evidentiary motions brought by the parties during trial, I adopted a flexible approach suggested by Supreme Court Rule 17.2.¹⁷ Relying on the Court's pronouncements, I took a generous view of the admission of evidence and factual development. *See, e.g., United States v. Texas*, 339 U.S. at 715. I generally favored a principle of inclusion over exclusion in creating a record. *See, e.g., Tr. 7/30/96 at 2778*. This seemed the best course in a proceeding before a special master sitting without a jury, whose task is to prepare a complete picture for this Court to evaluate.

My tendency toward over-inclusiveness prompted objections from both States, in particular New York. Her objections in this respect became increasingly pointed, as her attorneys suggested that I was admitting evidence and testimony in an evenhanded manner. *See, e.g., Tr. 7/23/96 at 1610* (Ms. Kramer for New York opines that "I think, frankly, there has been an un-evenhandedness in the rulings here."); *Tr. 7/25/96 at 1971* (Ms.

¹⁷ Rule 17.2 addresses procedure in original jurisdiction cases. It states: "The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In all other respects, those Rules and the Federal Rules of Evidence may be taken as guides."

Kramer comments that “[i]t’s unusual” when New York prevails on an objection); Tr. 7/26/96 at 2139 (Ms. Kramer reiterates the “un-evenhandedness” of the Court’s rulings). Sensitive to this criticism, I carefully evaluated my rulings and believe that they were, indeed, fair, reasonable, and supported by law. All rulings were made in the interest of the smooth and expeditious progression of trial and were squarely supported by the federal rules and Supreme Court practice.

2. Substantive Bases For The Decision

I have reached my recommendations after a thorough review and analysis of the initial pleadings and subsequent briefs by the parties and amici, the extensive record of testimony and exhibits produced by and for trial, the applicable jurisprudence, pre-Compact, Compact and related history, post-Compact events, pre-trial motions, closing arguments of counsel and post-trial memoranda.

I have been presented with an interstate border case based upon an interstate compact. The Compact of 1834 was approved by the Congress of the United States and is thus tantamount to a federal statute.¹⁸ My primary task has thus been to interpret that Compact. I have regarded the plain meaning of the Compact to be controlling in the instances where it is unambiguous—for example, in Article First’s delineation of the boundary between the States.

Where it has been necessary to probe beyond the language of the Compact for guidance, I have relied mainly on primary sources placed in the record by the parties or their experts during trial or on congressional or state docu-

¹⁸ Technically, negotiations under the Compact were concluded in 1833, but because it did not become law until Congress approved it in 1834, I have used that date to describe it, unless the prior year was more appropriate for the context of discussion.

ments of accepted probative value. The primary documents in the record are the most important extrinsic evidence. Later interpretations of these documents by judges in various cases, by commissioners or by experts at trial, while probative, are not as reliable. See *Arizona v. California*, 292 U.S. 341, 360 (1934) (declining to consider evidence of oral statements by negotiators "which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body."). The extrinsic evidence I have considered includes the original record in the 1829-30 *New Jersey v. New York* case; pre-Compact history, including facts stipulated by the parties in the Joint Pre-Trial Order; pre-Compact negotiations; pre-Compact and post-Compact related jurisprudence from this Court and the courts of both States; expert testimony; and written reports. I have evaluated and relied upon historic maps prepared during relevant time periods and submitted in evidence, as well as maps and surveys prepared by the parties for this case.

I have also given weight to the course of conduct of the parties and the federal government in operating according to the terms of the Compact after 1834. This conduct, while not direct evidence of the intent of the States in framing the Compact, is probative of theories about Compact meaning because it preceded the litigation-inspired theories offered in this case. In this regard, I find the 1921 Port Authority amendment to the 1834 Compact ("Port Authority amendment"), as well as the legislative reports submitted in connection with that amendment, significant and revealing. This amendment—the only such amendment—to the Compact raised vital issues concerning Harbor management for both States.

In addition to construing the Compact, I discuss and draw upon various principles of common or international

law, in particular the doctrines of avulsion and accretion and prescription and acquiescence. These rules of law are incorporated into this Court's original jurisdiction jurisprudence.

To fashion the recommended remedy, I have relied upon this Court's decisions that emphasize the practical and equitable dimensions of my task. While construing the Compact according to intrinsic and extrinsic evidence in order to determine the appropriate boundary line on Ellis Island, I have borne in mind that this Court sits as a court of both law and equity, a dual role it has long assumed in original jurisdiction cases. Thus, I have sought to devise a boundary line that satisfies legal theory, and also that is fair, practical, and convenient. In short, I try to recommend a boundary that would actually work in a situation where two sovereign states must co-exist cheek-by-jowl on a small island under constant public scrutiny.

II. THE HISTORICAL SETTING

This Court has emphasized that in resolving boundary disputes between states "the nature and history of the controversy must be considered." *Vermont v. New Hampshire*, 289 U.S. 593, 605 (1933); see also *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) (stating that "'courts, in construing a statute, may with propriety recur to the history of times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it.'" (citation omitted)). This section is designed to meet that charge.

Few controversies ever to come before the Supreme Court have a stronger hold on our history and traditions. This boundary dispute is at least one hundred seventy years old, and may exceed three hundred years. Metaphorically, one could even place the beginning of the controversy almost four hundred years ago, when Henry Hudson, as recorded by his first mate, noticed the "soft

ozie ground" of several small islands while sailing into what would become New York Harbor.¹⁹ In terms of literary tradition, moreover, how many "little islands" can claim to have been celebrated in verse by Walt Whitman?²⁰

One of those islands, named after Samuel Ellis, an early owner, retains a profound hold on the American psyche. Ellis Island symbolizes the hopes of a new land, opportunity and redemption; for many, it is the place where the American dream began. From 1892 to 1954, twelve million immigrants were processed through its doors. Estimates suggest that one hundred million Americans, or forty percent of our citizens, trace their ancestry to that spot. See Dr. Alan M. Kraut Expert Report at 1 (undated) (DE 933). For them, Ellis Island is probably a more powerful symbol than Jamestown or Plymouth Rock.

The controversy between New Jersey and New York regarding their sovereign boundary was formally launched

¹⁹ One of New York's expert witnesses, Dr. Hershkowitz, commenced his report and trial testimony with references to Henry Hudson's journal (written on the *Half Moon* in 1609) in which Hudson apparently describes what became Ellis, Bedlow's, and Governors Islands. See Dr. Leo Hershkowitz Expert Report, *Ellis Island, the "Soft Ozie Ground"* 1 (Oct. 16, 1995) (DE 938) (citing J. Franklin Jamison, *Narratives of New Netherlands* 17, 19-21 (1909)); see also Tr. 7/23/96 at 1567-68.

²⁰ In her brief accompanying her motion for summary judgment, New York quotes from Whitman's poems *Manahatta* and *City of Ships*:

The following sea—currents, the little Islands, larger adjoining islands, the heights, the villas . . . City nestled in bays! My City.

. . . .

O the black ships!

O the fierce ships.

O the beautiful sharp-bow'd steam ships and sail ships,

City of the world. . . .

in 1829 with an original suit before this Court that was itself extremely controversial. *New Jersey v. New York*, 28 U.S. (3 Pet.) 461 (1830). That suit was brought to resolve an underlying boundary dispute between the States that predated the Constitution. The primary source of contention arose from the 1664 grant from King Charles II of England to the Duke of York that established New York as a royal colony. That grant led to a further transfer that same year from the Duke of York to Lord Berkeley and Sir George Carteret, the proprietors of the area that became New Jersey. This grant transferred the lands west of Long Island and Manhattan Island "bounded on the east part by the main sea, and part by Hudson's river." Report of the Commissioners on the Controversy with the State of New-York Respecting the Eastern Boundary of the State of New-Jersey ("Report of the Commissioners") at 6 (Oct. 30, 1807) (PE 199-221); Shenton Summ. J. Aff. ¶ 10 (Mar. 5, 1996) (PE 487). This language spawned a history of disputed interpretation. New York interpreted the New Jersey grant to be bounded on the east by the Hudson River, but not to include it. New Jersey countered that she, as a co-equal colony and state, was entitled to consider the middle of the river as the correct boundary. Shenton Summ. J. Aff. ¶ 11. In any event, their clashing interpretations of the terms of the 1664 grant were central to the lengthy negotiations that culminated in the 1834 Compact, which settled the 1829 lawsuit.

A. The Steamboat Controversy

The question of why the boundary dispute intensified when it did is itself interesting historically. In effect, the controversy matured with the advent of the steamboat and the growth of river commerce. The development of the steamboat was a boon to commerce on the Hudson River and the Bay of New York and it forced the States to determine territorial rights to navigable waters. In its practical dimensions, the boundary dispute thus has an

intriguing connection to one of the landmark decisions of this Court, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the steamboat monopoly case, through which Chief Justice Marshall announced the essential role of the federal government in the regulation of interstate commerce. An understanding of that decision illuminates the stakes behind the first *New Jersey v. New York* case, helps to explain why it arose when it did, and thus informs the analysis of the Compact.

The seeds of *Gibbons v. Ogden* were planted before the nineteenth century had even begun. In 1798 Robert Livingston secured from New York a monopoly for the operation of steamboats upon the waters of the State. The monopoly was over the entire Hudson River and Bay of New York, hence even traffic between New Jersey ports fell within its purview. On the basis of the monopoly and with Livingston's support, Robert Fulton built the *Clermont*. Her first voyage was in 1807. See Maurice G. Baxter, *The Steamboat Monopoly: Gibbons v. Ogden*, 1824 12-13 (Paul Murphy ed., 1972).

By exercising monopoly control of steamboat traffic over the entire Hudson River and New York Bay, New York effectively forced a resolution of the territorial issue. When steamboat traffic from Hudson River cities like Albany and Troy journeyed to the City of New York and across to ports in New Jersey such as Elizabethtown and Jersey City, clashes became inevitable. The same year that Livingston and Fulton launched their steamboat, commissioners from both States first met to resolve the question of the "eastern boundary of New Jersey." The States had authorized by legislative acts separate sets of commissioners to negotiate the boundary issue. See Report of the Commissioners; see also Governor's Message (Feb. 5, 1908) (PE 222-57). But after extensive written and face-to-face negotiations during September and October 1807, each set of commissioners reported back to their governors that they had been unsuccessful. See Report of Commissioners.

After the negotiations between the commissioners failed, each State staked her legislative claim to the River and Bay. The New Jersey legislature enacted a statute establishing "the boundary lines of the County of Bergen to be the middle or midway of the [Hudson River] waters adjoining the said county." Votes and Proceedings of the 43rd General Assembly of the State of N.J. ("Proceedings of the N.J. General Assembly") (Jan. 12, 1820) (PE 258). For her part, New York enacted a statute declaring "that the whole of river Hudson, southward of the northern boundary of the City of New York and the whole of said bay between Staten Island and Long or Nassau Island, shall so forth be deemed to be within the jurisdiction of the City and County of New York." 1808 N.Y. Laws 313-15.

It soon became clear that despite their legal monopoly, Livingston and Fulton did not exercise a technological monopoly over the use of steamboats. In 1808 John Cox Stevens at Hoboken built the *Phoenix*, intended to ply as a passenger boat between New Brunswick and New York. The monopoly held by Livingston and Fulton, however, prevented the *Phoenix* from entering New York waters. Stevens thus ran her between Philadelphia, Pennsylvania and Trenton, New Jersey.

A year later Fulton built the *Raritan*, which made trips between New Brunswick, New Jersey and New York City. The route between the two chief cities of the country thus essentially required travel on both the *Phoenix* and the *Raritan*. By 1810 the two ships ran in connection with each other as part of one route. The significant profits of the *Raritan*, of course, went only to Livingston and Fulton.

Irked, New Jersey demanded that if her citizens could not build a steamboat and send it across the Hudson River to New York without the permission of Fulton and Livingston, then no boat having the Fulton and Livingston

license should enter the waters of New Jersey. The States became engaged in a legislative jousting contest. New York had enacted a statute providing that if anyone should navigate a steamboat in New York waters without the Livingston and Fulton license, the party aggrieved by such unlicensed steamboating was authorized to seize the unlicensed boat. Referring to this New York law, New Jersey passed a statute providing that if anyone did seize such an unlicensed boat belonging to a citizen of New Jersey and lying on the waters between the States, the owners of the unlicensed boat were authorized to seize in return any boat belonging to any citizen of New York found in any waters of New Jersey. *See* Charles Warren, *The Supreme Court in United States History* 597-99 (rev. ed. 1926).

Fulton and Livingston now threatened to withdraw the *Raritan*, grant no licenses to run steamboats to New Jersey and thus ruin New Brunswick. Progress Report ("Report"), *N.Y. Legis. Docs.*, 142d Sess., No. 103, at 71-73 (1919) (citing 3 *McMaster's History of the People of the United States* 490-91). A formal challenge to the monopoly was inevitable.

The parties who brought the great test case that wound up in this Court were particularly well-suited to the task. Aaron Ogden personified the connections between the steamboat monopoly and the territorial claims by New York and New Jersey. He had been one of the four commissioners selected by the State of New Jersey in 1807 to present her claims to New York. Initially, he operated a steamboat between New York and Elizabethtown, New Jersey in defiance of the monopoly, but he ultimately accepted a license from the successor-owner of the license and ended up supporting the monopoly. The defendant was Thomas Gibbons, a partner of Ogden's, who operated a second steamboat from New Jersey to New York in derogation of the monopoly.

The irony of Ogden suing a New Jersey partner in New York to enforce a monopoly granted by New York could not have been lost on the legal community of the time. The New York Chancery Court granted Ogden an injunction against Gibbons's competing operation and its decision was upheld by the New York Court of Errors.

On appeal to this Court, Gibbons argued that the state monopoly by itself violated interstate commerce and that, in any event, his *federal* coasting license had the effect of preempting state regulatory law. See 22 U.S. at 3-33.²¹ The existence of the federal license allowed the Court to vindicate Gibbons's position and also to avoid resolving whether states retained power to legislate on matters of interstate commerce in the absence of federal legislation. See 22 U.S. at 212-15. The actual holding of *Gibbons* was therefore a narrow one, even though its implications set the stage for the expansion of federal power over interstate commerce. After *Gibbons* the distinction between inter- and intrastate commerce remained elusive and led to further litigation in New York.

Some holders of the Livingston-Fulton monopoly were not prepared to quit. Promptly after this Court's decision, an interloping steamboat, deceptively named *The Olive Branch*, challenged the intrastate dimension of the monopoly. Interstate routes were obviously precluded by *Gibbons v. Ogden*; the legality of purely intrastate trips, however, was unresolved. On appeal from the Chancery Court, Chief Justice John Savage, writing for a majority in the New York Court of Errors, refused to enjoin competitive traffic even if it involved a purely intrastate trip. *North River Steamboat Co. v. Livingston*, 3 Cow. 714 (N.Y. 1825). With this decision, the steamboat monop-

²¹ Daniel Webster argued the first point for the appellants and William Wirt, Attorney General of the United States, the second.

oly was brought to an end after some thirty contentious years.

The question of territorial rights between New Jersey and New York, brought to the surface by the steamboat monopoly, only increased in importance. It has been estimated that the number of commercial steamboats grew from eight to sixty-four a year after *Gibbons v. Ogden* was decided. See John Steele Gordon, *The Steamboat Monopoly*, 44 Am. Heritage 20-21 (Nov. 1993). As competitive steamboat traffic brought increasing commercial activity, shorelines and harbor access became even more crucial.²²

²² During the era of the steamboat controversy, Ellis Island, although not a focal point in the use of the Harbor, also changed hands. In 1800 New York enacted legislation ceding substantial jurisdiction over Governors, Bedlow's and the Oyster Islands (of which Ellis Island was one) to the federal government. 1800 N.Y. Laws 7. New York reserved to herself "the execution of any process, civil or criminal, issuing under the authority of this state." *Id.*

In 1808 New York enacted legislation authorizing her governor to purchase Ellis Island, which had been in private hands, for \$10,000; it was then conveyed to the United States on June 30, 1808. That deal has been described as follows:

[Lieutenant Colonel] Williams [of the United States War Department] ran into "all manner of difficulties" about the title [to Ellis Island] and decided to ask the state of New York to give the federal government title and buy up the different claims. The necessary legislation was forthcoming, calling for condemnation by a special jury. The jury priced the island at \$10,000, and Williams was outraged. They had "estimated capabilities instead of real estate . . . taking into consideration the advantage of setting fish nets on the flatts all around, letting rakes to the oystermen, & keeping a house of entertainment for all these amphibious customers" [he wrote]. It was a very high price to pay for "2¾ acres of sand bank."

Thomas M. Pitkin, *Keepers of the Gate: A History of Ellis Island* 5 (1975).

The federal government built Fort Gibson on the Island in the period immediately preceding the War of 1812. Shenton Summ. J. Aff. ¶ 9.

B. The Original *New Jersey v. New York* Case

In order to resolve the extent to which each could control the traffic calling at her own ports, or indeed still control the burgeoning traffic on the navigable waters of the Hudson and the Harbor, the States renewed negotiations. Soon a new set of commissioners with a familiar mission—drawing the interstate boundary between New Jersey and New York—was appointed. They began meeting in June 1827 and continued through September of that year. By January 1828 both sides acknowledged that, like their 1807 brethren, they had failed to reach an amicable resolution. Report of the Commissioners of New York (Jan. 26, 1828) (PE 280-92).²³ They then concurred in the “expediency of referring the decision of the controversy to some indifferent and impartial tribunal.” This language was stated in New Jersey’s letter to New York of September 15, 1827, and quoted in apparent agreement by New York on September 17, 1827. *Id.* By “impartial tribunal,” however, New Jersey had intended the United States Supreme Court, whereas New York expressed the view that perhaps their respective governors should meet. *Id.*

On February 20, 1829 New Jersey filed suit against New York in this Court. *New Jersey v. New York*, 28 U.S. (3 Pet.) 461 (1830).²⁴ The purpose of the lawsuit was to settle the sovereign boundary between the States, but New Jersey conceded in her complaint that New York had acquired Ellis Island by adverse possession. *See supra*

²³ The commissioners for New York were John T. Irving, Nathaniel Pitcher, Samuel A. Talcott, Harmanus Bleeber, and Hemm I. Redfield. New Jersey was represented by Richard Stockton, John Rutherford, Theodore Frelinghaysen, James Parker, and Lucius Q.C. Elmer. James Parker had also served as a New Jersey commissioner in 1807.

²⁴ New Jersey was represented by William Wirt, Attorney General of the United States, who had earlier represented Gibbons before the Court in *Gibbons v. Ogden*. *See supra* note 21.

Part I.B. New York refused to respond to New Jersey's complaint, raising reservations about the power of this Court to compel sovereign states to appear before it.²⁵ At New Jersey's request, this Court issued a subpoena ordering New York to appear, adding the threat of proceeding to judgment *ex parte* if no response was forthcoming. See *New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 287 (1831). In that Order, Chief Justice Marshall stated: "This is a bill filed by the state of New Jersey against the state of New York, for the purpose of ascertaining and settling the boundary between the two states." *Id.* at 284.

New York did not respond directly to the Court's order, but rather filed a demurrer in lieu of an appearance. New Jersey objected to this approach as not constituting a proper answer, but upon briefs filed, the Chief Justice ruled that the demurrer constituted an appearance before the Court and an "answer" to the bill filed by New Jersey. Thus, three years after the case was filed it seemed ready for hearing. See *New Jersey v. New York*, 31 U.S. (6 Pet.) 323, 327 (1832). At that point, however, the States once again moved to the negotiating table and the talks that would lead to the Compact of 1834 began.

III. THE COMPACT OF 1834

In 1833 the States once again appointed commissioners to resolve their longstanding territorial dispute. This third attempt at settlement was finally to bear fruit.²⁶

²⁵ New York's attorney general rendered a legal opinion that this Court's power under the Constitution to hear original cases between states was a dormant one that had to be activated by congressional action. New York's governor agreed, and supported his attorney general's refusal to appear "without intending any disrespect to that high tribunal." Governor's Communication to Assembly (Mar. 11, 1831) (PE 297-A).

²⁶ The commissioners for New York were Benjamin F. Butler, Peter Augustus Hay, and Henry Seymour; for New Jersey they

A. Description Of The Compact

On September 16, 1833 the commissioners entered into a Compact that was enacted into law by the legislatures of both States in February 1834. Article Eighth of the Compact made it binding upon the States only after their legislatures confirmed it and the United States Congress approved it. On June 28, 1834 Congress enacted a statute that recited the agreement and declared that

the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, PROVIDED, That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

Id. at 711. By in effect preserving federal jurisdiction over navigable waters in the Hudson River and New York Bay, the above provision reflected the interstate commerce determination in *Gibbons v. Ogden* as well as the fact that Ellis Island was then owned and occupied by the United States as a defense installation.

The statute also contained annotations from Supreme Court decisions describing Congress's role in approving Compacts:

It is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between the respective limits; and the boundaries so established and fixed

were Theodore Frelinghaysen, James Parker, and Lucius Q.C. Elmer. (The three New Jersey commissioners had also served as part of New Jersey's 1827-28 negotiating team.) Both sets of commissioners were appointed by statutes enacted by New York and New Jersey respectively on January 18, 1833 and February 6, 1833. Both statutes stated the purpose of their mission to be the settlement of the "territorial limits and jurisdiction" between the States. Act of June 28, 1834, 4 Stat. 708, 709 (1834).

by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the real boundaries. This right is expressly recognised to exist in the states of the Union, by the constitution of the United States; and is guarded in its exercise by a single limitation or restriction, only, requiring the consent of Congress.

4 Stat. at 708 n. (b). These references serve to highlight that states enter into compacts to set sovereign boundaries, and that, under the Constitution, only sovereign states may fix and only Congress may approve boundaries between states.

B. The Terms Of The Compact

The Compact is divided into eight articles.²⁷ The States have focused their attention on the first three articles, which they agree encompass the core of the dispute. These articles provide:

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

²⁷ See App. A. Appendix B contains a recently drawn map of the Article First boundary line to provide a visual depiction of the Compact's otherwise complicated descriptive terms. This map was prepared by the NPS. See U.S. Dep't of Interior/Nat. Park Serv., Analysis of Alternatives for the General Management Plan, Statue of Liberty National Monument, New York, New Jersey (1980) (PE 484). It was accepted into evidence. See Tr. 7/25/96 at 2004-06.

ARTICLE SECOND. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state: and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, *Provided*, That the navigation be not obstructed or hindered.

Article First draws the "boundary line" between the States down the middle of the Hudson River and of the Bay of New York. Article Second reserves for New York

"present jurisdiction" over Ellis Island, which was on New Jersey's side of the boundary established in Article First. Article Third describes New York's "exclusive jurisdiction" over the waters of the Bay and the Hudson and over the land covered by those waters to the low-water mark on the New Jersey side. This article also describes New Jersey's "exclusive right of property" in the land under water on its side of the Hudson River boundary and "exclusive jurisdiction" over her wharves, docks, and improvements. As discussed below, these terms are not a model of drafting clarity.

IV. INTERPRETATION OF THE COMPACT OF 1834

A. Relevant Jurisprudence Of The Supreme Court

The Compact Clause of the United States Constitution, art. I, § 10, cl. 3, provides that "[n]o State shall, without the consent of the Congress, . . . enter into any Agreement or Compact with another State. . . ." The Court has indicated that "congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). The Court observed that "[b]y vesting in Congress the power to grant or withhold consent . . . the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative State action that might otherwise interfere with the full and free exercise of federal authority." *Id.* at 439-40 (citing Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1925)). Thus, this Court has noted that "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *see also Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *Arizona v. California*, 373 U.S. 546, 565 (1963).

These cases treat an interstate compact as a statute, and thus employ ordinary rules of statutory construction in its interpretation. The most important and well-established of those rules is that, if possible, the Court will undertake a plain-language reading of the terms of a compact. The Court has declared this unambiguously:

[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

Green v. Biddle, 21 U.S. (8 Wheat.) 1, 89-90 (1821). The Court will explore "textual reasons" for compact terms and examine the structure and the entirety of an agreement to evaluate the reasonableness of an interpretation of one portion. See *Cuyler*, 449 U.S. at 446-47; see also *Carchman v. Nash*, 473 U.S. 716, 724-26 (1985); *United States v. Utah, Nev. & Cal. Stage Co.*, 199 U.S. 414, 423 (1905).

Where a compact is ambiguous, however, the Court may also consider reliable extrinsic evidence. See, e.g., *United States v. Texas*, 339 U.S. 707, 715, modified, 340 U.S. 848 (1950). The question of whether to look outside the four corners of a compact is one that this Court has addressed in a variety of contexts. See, e.g., *Texas v. New Mexico*, 482 U.S. at 128; *Arizona v. California*, 292 U.S. 341, 359-60 (1934). Recently, the Court indicated that the parol evidence rule is not applicable to the interpretation of an interstate compact because of a compact's dual character:

[I]t is appropriate to look at extrinsic evidence of the negotiation history of the Compact . . . [because]

a congressionally approved Compact is both a contract and a statute and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous. . . . Thus, resort to extrinsic evidence of the Compact negotiations . . . is entirely appropriate.

Oklahoma v. New Mexico, 501 U.S. 221, 234 n.5 (1991) (citations omitted). In that case the Court first looked at compact language, but found it ambiguous, noting a literal reading would produce an outcome demanded by neither litigant. The Court established the "central purpose" of the Compact, partly informed by legislative history, and overlaid the "apparent intent" of the drafters on Compact terms to achieve harmony in interpretation. *Id.* at 237-38.

Much time was devoted to interpretation of the 1834 Compact both before and during trial. In denying summary judgment, I set out a series of questions about the Compact and its history and operation that I asked the parties to address at trial. See Interim Op. at 43-45 (May 9, 1996) (DI 286). At trial, the parties responded in part to these questions. This recommended decision will review that evidence in finding facts and reaching conclusions about the meaning of the Compact. The Compact sets the boundary, and thus the boundary question is subsumed into one of Compact interpretation.

My approach begins with the Compact as the source of authority and resorts to extrinsic sources as necessary to illuminate opaque or vague terms. In the end, however, my conclusion will be based upon what the evidence shows the parties actually intended at the time they signed the Compact. That conclusion will drive my recommended remedy.

B. Analysis Of The Compact

Certainly it would be preferable to resolve interpretative issues solely in terms of Compact language. The

intent of the drafters of the Compact ideally would be determined from what was recorded between them. If the Compact clearly expresses what the parties negotiated, more tentative ventures into extrinsic sources and their legitimacy could be avoided. But as I indicated in denying the States' cross-motions for summary judgment—and neither State has objected to that decision—this Compact is incapable of interpretation solely on its face. Thus, Compact “meaning must be fleshed out by further analysis and explication of extrinsic and intrinsic evidence.” *Interim Op.* at 31.

1. *Positions Of The States And Amici*

The States have urged this Court to consider at least four interpretative sources: (1) pre-Compact history; (2) contemporaneous and later judicial decisions and other legislative and executive declarations by each State; (3) subsequent decisions of this Court and other federal courts; and (4) other federal actions and statements concerning Ellis Island and the boundary issue.

a. *New Jersey's Position*

New Jersey urges this Court to interpret the central purpose of the Compact in Article First as setting the sovereign boundary. She points out that resolution of that issue was achieved only after three sets of negotiations over more than twenty years between commissioners from both States. *N.J. Post-Trial Br.* at 1-2 (Oct. 12, 1996) (DI 366). In sum, during pre-Compact negotiations: “It is obvious that New Jersey’s primary objective was the establishment of a sovereign boundary at the middle of the waters between the States and that New Jersey filed suit [in 1829] when it could not secure that objective from New York by voluntary means.” *Id.* at 5. She points to judicial precedents that support this view, notably *Central Railroad Co. v. Mayor of Jersey City*, 209 U.S. 473 (1908) and *People v. Central Railroad Co.*, 42 N.Y.

283 (1870), *appeal dismissed*, 79 U.S. (12 Wall.) 455 (1872).

This conclusion is also supported, suggests New Jersey, by subsequent actions by the two States. In the 1880s, for instance, a bi-State Commission identified the boundary as having been established in the middle of the Hudson and Bay waters in 1834. *See App. D; see also N.J. Post-Trial Br. at 3.* The 1921 Port Authority Act did the same. *N.J. Post-Trial Br. at 3.*

Because the Compact established the sovereign boundary, it follows, argues New Jersey, that "the Ellis Island referred to in Article II was the Ellis Island that existed in 1834." *Id.* at 7. This preserved the status quo at the time, as shown by the Compact's use of "present-tense language" in Article Second. *Id.* at 8. After Article First set the "boundary" as the supreme operating principle and the object of the Compact, all else must be understood within the framework of a mid-River and Bay boundary line. To New Jersey, "jurisdiction" means different (and perhaps inconsistent) things under the terms of the Compact. In Article Second, for instance, "present jurisdiction" means whatever governmental authority New York had not ceded to the federal government over Ellis Island in 1808, as well as a geographical limit. In Article Third, "exclusive jurisdiction" means police power. Thus, the meaning of "jurisdiction" needs to be understood in the contemporary context of 1833 to 1834. New Jersey's proposed remedy is for divided sovereignty on the Island with a boundary at the high-water mark of the 1834 Island.

b. *New York's Position*

New York, whose position on Compact interpretation was further refined even during trial, now argues that as "the original proprietor" she *granted* New Jersey only property rights on her side of the River. *N.Y. Post-Trial Mem. at 4 (Oct. 3, 1996) (DI 365).* New Jersey's Com-

pact goals, she maintains, were "to extract from New York the wharfing-out rights [New Jersey] needed to control and promote its commercial development." *Id.* at 7. New York argues that "boundary" under Article First means five different things:

Thus, the term "boundary" in the 1834 Compact acquires a different meaning at different points along the Compact's 20 mile border. This is because the terms "property" and "jurisdiction" in the Compact refer to categorically different rights. . . .

Boundary under the Compact, then, includes sovereignty only when the Compact gives one state or the other " 'jurisdiction.' "

Id. at 8. This theory of the boundary revived New York's pre-Compact assertions that New Jersey's eastern boundary was at the shore.

New York imbues "boundary" with a chameleon-like character, attributing a traditional meaning to that word only when it is specifically linked to "jurisdiction." Thus, she creates an analytical tool to permit the introductory sentence of Article Third to overpower the terms of Article First. She accords the word "property" heightened importance because that is the interest she believes was accorded New Jersey to the mid-line side of her eastern shore.

Article Third, under New York's theory, gives New York sovereign jurisdiction to New Jersey's low-water mark, leaving for New Jersey only "property rights, fishing rights, and the right to wharf-out from its shores." N.Y. Post-Trial Mem. at 9. New York concludes that "[i]n Article Three, then, as the 1890 commissioners recognized, the mid-Hudson River boundary is not a sovereignty line, but, rather, a property line. The real sovereignty line in this part of the Compact . . . is at the low water mark along the New Jersey shore." *Id.* at 10 (citations omitted); *but see supra* note 5 (during trial, New

York asserted a boundary *below* the low-water mark). New York further maintains that, by conceding that "jurisdiction" means sovereignty over Ellis Island in Article Second, New Jersey has to be consistent and recognize that "jurisdiction" means "sovereignty" wherever it is used in the Compact. *Id.* at 12. In addition, New York has argued several times during this case that Justice Holmes was wrong in concluding that "boundary" means sovereignty and that the *Central Railroad* case is in any event distinguishable.

Thus, New York would have this Court maintain the status quo as New York interpreted it after trial, that is, to declare the boundary in the relevant portion of the Hudson River at the low-water mark of New Jersey's eastern shore (subject to New Jersey's wharfing-out rights). This would leave New York sovereign over the entire Island by virtue of her sovereignty over the waters and underwater land around Ellis Island.

c. Positions Of The Amici Curiae

The City of New York argues that the Compact of 1834 must be construed against "the conceptual backdrop of the contemporary legal and political debates which led to its genesis," as well as according to normal canons of statutory construction. The City Post-Trial Br. at 14 (Oct. 12, 1996) (DI 367). The City argues that "exclusive jurisdiction" under Article Third grants New York sovereignty over the waters and underwater lands west of the boundary line set out in Article First. The City points in particular to Article Third's provision to New Jersey of "exclusive jurisdiction" over the improvements on her own shores, which would not have been necessary to point out if New York had not been accorded sovereignty over these waters and underwater lands. *Id.* at 16-17.

The City of Jersey City has noted that its boundaries and those of Hudson County "extend to the midpoint of

the Hudson River" through nineteenth-century legislation "[i]ncorporating, reincorporating and expanding the City's boundaries." Br. in Supp. of Mot. to Intervene or in the Alternative to Participate as Amicus Curiae of the City of Jersey City, Ex. A (Oct. 10, 1995) (DI 172). The City of Jersey City further points to its authority to "tax property under the Hudson River, lying to the west of the middle of the river." *Id.* at 21. Hudson County notes her direct interest in Ellis Island, particularly because "water and sewage and other utilities to the island are governed from the state of New Jersey, Hudson County and the City of Jersey City." Mot. for Leave to File a Br. Amicus Curiae of Hudson County at 20 (Oct. 6, 1995) (DI 168).

2. Discussion

a. *Intrinsic Evidence: A Compact Reading*

My intrinsic reading of the Compact presumes that the drafters were drawing an interstate boundary. Both the filing of the 1829-30 *New Jersey v. New York* case and the structure of the Compact support this presumption.

(1) The Key Articles: First, Second And Third

(a) *Background*

Three key terms must be interpreted to understand the Compact: "boundary," "jurisdiction" ("exclusive" and "present"), and "property." "Sovereignty," although a critical concept much discussed during trial, does not appear in the Compact.

The term "property" has an agreed, traditional meaning of ownership and is relatively free from ambiguity. It produces interpretative difficulties because of its relationship to the other key terms, but both States agree that property is a concept that is subordinate to jurisdiction or sovereignty.

The purpose and structure of the Compact help to determine the meaning of these terms. The Congress's introduction and "whereas" clause make clear that the overarching purpose of the agreement was to settle a territorial boundary dispute and delineate "territorial limits and jurisdiction" between the States. Indeed, that phrase is repeated four times at the outset of the agreement. The power of Congress was invoked precisely because the States were finally settling their age-old boundary dispute. Because only Congress is empowered to approve agreements settling interstate boundaries, its adoption of the Compact as a statute highlights the sovereign dimensions of its role. *See supra* Part IV.A.

Such an interpretation is reinforced by the fact that this Court had previously stated that the purpose of Article First was to draw the territorial boundary. In the 1829-30 *New Jersey v. New York* case, Chief Justice Marshall announced that the purpose of the litigation was territorial. *See supra* Part II.B. Because original jurisdiction cases are brought to resolve interstate disputes, and keeping in mind the language Congress used to introduce the Compact, the terms "territorial limits" and "boundary" are synonymous. Moreover, the word "boundary" was used frequently by the States in a territorial sense throughout the earlier negotiations that attempted to draw a boundary. Once "boundary" is connected to territory, the sovereign nature of the determination follows as a matter of course. Thus while the word "sovereignty" does not appear in the Compact, it pervaded the Compact drafting process.

(b) *Article First: The Territorial Boundary Between The States*

Article First of the Compact describes a "boundary line" between the States, as one would expect from the foregoing. The ordinary and natural meaning of "boundary line" in the context of an interstate compact—both today and in 1833—is the line dividing the sovereign ter-

ritories of states. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (discussing interstate commerce and stating that commerce among the states "cannot stop at the external boundary line of each State."); *Id.* at 97 n.26 (noting an act of New York, passed February 26, 1803, which describes the "north boundary line" of New Jersey); *Vermont v. New Hampshire*, 289 U.S. 593, 600 (1933) (interpreting the provision of the 1764 "Order-in-Council" of King George III describing the "boundary line" between the states as fixing the sovereign territory of the states).²⁸ The placement of the singular phrase "boundary line" in the first article gives it controlling importance.

Article First describes the sovereign boundary between the States with the qualifier "except as hereinafter otherwise particularly mentioned." Here the plain meaning of the words in the Compact must be evaluated within the context of the entire Compact. Although the qualifier suggests that subsequent articles will describe exceptions to the boundary line set out in Article First, the words "boundary line" do not appear in the Compact again. If the drafters intended to change the boundary line set out in Article First, presumably they would have used the same locution elsewhere in the Compact. Thus, I conclude that the boundary line between the States is not changed by the subsequent articles.

This interpretation of Article First is buttressed by Articles Third and Fifth. If subsequent articles are con-

²⁸ See also *Nebraska v. Iowa*, 409 U.S. 285, 285 (1973) (*per curiam*) (issuing decree describing interstate boundary and noting that in 1943 the states had "determined to agree by compact upon a permanent location of the boundary line."); *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (explaining that whether an interstate agreement fits within the Compact Clause depends on whether "the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected" and thus encroach on federal authority).

strued to change the boundary line, the opening paragraphs of Articles Third and Fifth would significantly contradict Article First. The Compact should be construed so that one section will not contradict another. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249-54 (1985) (if the literal language of the controlling section of the statute contradicts another section, the controlling section should be harmonized so as not to render the other section inoperative, and the minimal ambiguity of the harmonizing interpretation does not mean that such interpretation fails as the most reasonable). If the drafters intended to describe the territorial boundary itself between the States in these opening paragraphs of subsequent articles, they would not have included Article First at all. The opening paragraphs of subsequent articles would do the work of Article First and the numbered exceptions of Articles Third and Fifth would have been articles themselves—that is, exceptions to the rule.

(c) *Subsequent Articles: Exceptions To
Sovereign Jurisdiction*

The Article First qualifier “except as hereinafter particularly mentioned,” of course, must be read to comport with the articles that follow. The Compact should be read so as to give effect to all of its provisions. *See Cuyler*, 449 U.S. at 446-48; *Utah, Nev. & Cal. Stage Co.*, 199 U.S. at 423; *see also Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1451-52 (1995) (effect must be given, if possible, to every word, clause, and sentence of a statute). This analysis requires interpreting the meaning of “jurisdiction” (“present” and “exclusive”) in the Compact. The natural and ordinary meaning of “jurisdiction” is the power to proscribe, prescribe, adjudicate, and enforce law. Rebecca M.M. Wallace, *International Law* 101 (1986). This core meaning of jurisdiction is the same today as it was in 1834. Although jurisdiction is an attribute of state

sovereignty, a state may exercise jurisdiction outside its territory. *Id.* The most reasonable reading of the Compact, based upon the above analysis of Article First, is that articles subsequent to Article First describe exceptions to the jurisdiction concomitant with the sovereignty suggested by the boundary line.

The opening paragraphs of Articles Third and Fifth thus confer on New York and New Jersey, respectively, power to make and enforce law that diverges from the authority otherwise suggested by the boundary line of Article First. These paragraphs confer extra-territorial jurisdiction without changing the boundary between the States, thus satisfying the role suggested by Article First's qualifier.

The numbered exceptions to the opening paragraphs of Articles Third and Fifth clarify that these articles do not confer extra-territorial jurisdiction to the absolute exclusion of the powers of jurisdiction of each State in her territory. Each State retains attributes of sovereignty over her lands and waters over which the other State would otherwise exercise "exclusive" extra-territorial jurisdiction. Even the numbered exceptions, moreover, contain exceptions. Articles Third and Fifth describe specific forms of extra-territorial jurisdiction, but do not confer unqualified jurisdiction to either State in the territory of the other.

Thus, although New York exercises extra-territorial legal authority over the navigable waters in New Jersey's territory under Article Third, the first exception in that article clarifies that (consistent with Article First) New Jersey has the "exclusive right of property." The most reasonable interpretation of that phrase is that New Jersey remains sovereign over these underwater lands. This is restated to ensure that the jurisdictional exception to the boundary is not over-interpreted.

Under this reading, "jurisdiction," as a fundamental and ubiquitous term of legal parlance, assumes several

meanings. I cannot agree with the meaning that both New York and amicus The City of New York urge upon this Court—the territorial one.²⁹ New York's position would have "jurisdiction" in Article Third trump "boundary" in Article First. That conclusion cannot be accepted. Instead, in Article Third, the word "jurisdiction" connotes the role described above.

My analysis is buttressed by the appearance of "jurisdiction" many times in the Compact while "boundary" appears just once, in Article First; in my view that elevates rather than diminishes the territorial significance of "boundary" over "jurisdiction." "Boundary" becomes a more reliable single indicator of the purpose and design of the Compact than "jurisdiction," which takes on—even according to New York—a chameleon-like character that changes with location.

New York posits an interpretation of "boundary line" as describing the property boundary between the States. Under that reading, the phrase "exclusive right of property" in Articles Third and Fifth would echo Article First. This interpretation fails for several reasons. First, as explained above, the ordinary and natural meaning of the locution "boundary line" in a compact is a line dividing the sovereign territories of states. Second, and complementing the first point, in light of the controlling position of Article First, it is reasonable to interpret its provisions as of the greatest importance—that is, describing sovereign territory. If Article First describes merely a

²⁹ The City of New York's amicus brief goes to considerable effort to elevate the term "jurisdiction" to a sovereign level and thereby to minimize the meaning of the term "boundary." By citing Vattel's *Law of Nations* (J. Chetty ed., 7th Am. ed. 1849), a French treatise which by 1797 was available in the United States, the City seeks to equate jurisdiction with sovereignty. The City's efforts are creative and thoughtful, but they are not ultimately convincing. Jurisdiction, even under the City's definition, must also assume several meanings, not all of which imply sovereignty. The City Post-Trial Br. at 4-18.

property boundary, the subsequent articles do not carve out exceptions, but instead reduce Article First to an exception to Articles Third and Fifth. Third, Article First fails on a literal reading if interpreted as drawing a property boundary: there would be no exceptions to this property line. Under this reading, the Article First property boundary *does* describe the boundary of the States' "exclusive right of property" in Articles Third and Fifth; these articles do not function as exceptions at all. Article Second, moreover, defines jurisdiction; it does not describe an exception to the Article First property *line*. Finally, as set out below, the extrinsic evidence supports a reading of Article First as describing a sovereign boundary, not a property boundary. *See infra* Part IV.B.2.(b).

While it is not necessary to my decision, I also note that the Compact becomes capable of a *facial* interpretation if the central purpose of the Compact and the mission of the negotiators is overlaid on Article First, and one elliptical phrase, "with concomitant sovereign jurisdiction," is inserted into that article immediately before the qualifier "except as hereinafter otherwise particularly mentioned." *Cf. Cuyler*, 449 U.S. at 446-47; *Oklahoma v. New Mexico*, 501 U.S. at 237-38 (examining "apparent intent" of the drafters of an interstate compact); *see also Central R.R. of New Jersey v. Mayor of Jersey City*, 56 A. 239, 243-44 (N.J. Sup. Ct. 1903). If the Court, for analytical purposes, inserts those four words, the Compact becomes unambiguous. The jurisdictional exceptions are then clearly set forth in subsequent articles. Those exceptions, then, do not complicate or nullify the sovereign boundary established in Article First. Further, this reading is fully supported by all of the extrinsic evidence from trial and is an inevitable conclusion concerning the meaning of Article First.

By contrast, the meaning overlaid on Article First under New York's view effectively dismantles the article.

Her interpretation—that is, the five-boundary interpretation she ultimately adopted—is illustrated by inserting, after Article First's qualifier, a phrase resembling the following: "such that the only portion of the boundary line set out in this Article that is not entirely changed by the articles that follow is the line running through the Hudson River above the Spuyten Duyvil." This interpretation renders most of Article First functionally irrelevant: the exceptions are made to swallow the rule. In my view, New York's creative interpretation stretches beyond its breaking point the apparent intent of the drafters.

(d) *Article Second: Ellis Island*

The locution "exclusive jurisdiction" in the opening paragraphs of Articles Third and Fifth should be interpreted to convey a similar meaning in Article Second. *BankAmerica Corp. v. United States*, 462 U.S. 122, 129 (1983) (the same terms in the same statute should be interpreted in conjunction with each other); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (same). Thus, Article Second accords New York some degree of extra-territorial law-making and law-enforcing authority over the 1833 islands in New Jersey's territorial waters. In contrast to Articles Third and Fifth, Article Second confers jurisdiction, both "present" and "exclusive," without exception. The plain and ordinary import of jurisdiction without exception is the authority of a sovereign. In context, then, "exclusive jurisdiction" conveys complementary but distinct meanings in Articles Second and Third. The distinction between "present" and "exclusive" jurisdiction in Article Second, which becomes clear upon consideration of extrinsic evidence, is thus not important. Although Article Second does not change the boundary of Article First, harmonized with the entire Compact, it provides that New York will retain her sovereignty over islands in New Jersey's sovereign waters as they existed at the time of the Compact.

The "present jurisdiction" formulation in Article Second applies to Bedlow's Island as well, but the other islands, over which New York was granted "exclusive jurisdiction" in Article Second, are no longer in existence. Hr'g Tr. at 24.

The word "present" has been the source of conflicting interpretation in this litigation. New Jersey would give the phrase two meanings—one legal and one geographical. She suggests that present jurisdiction in a legal sense refers to the fact that New York had already ceded jurisdiction of Ellis Island to the United States to erect harbor fortifications which were in place in 1834.⁸⁰ New York concurs in that interpretation.⁸¹

⁸⁰ [MR. YANNOTTI for New Jersey:] . . . "[P]resent jurisdiction" clearly confines New York's authority to the 2.74 acres that existed in 1834.

Justice Holmes, in his review of Article II in *Central Railroad* . . . stated that the phrase "present jurisdiction" was intended to preserve the status quo that pertained in 1834.

To interpret the Compact in the free-wheeling, expansionist manner New York proffers would contradict the plain language of the agreement . . .

SPECIAL MASTER VERKUIL: Well, New York does say that the status quo, if you will, which the words "present jurisdiction" was intended to maintain, was the status quo that the Federal Government had possession of the island for purposes of a fort to protect the harbor from invasion.

MR. YANNOTTI: . . . [In] 1834, New York had already ceded its jurisdiction to the Federal Government over the 2.74 acres. It did not retain governmental authority.

So, the Federal Government was operating a military facility on the island in those years, and the reference to present jurisdiction is reference to virtually no jurisdiction, as we see it. It was merely [that] you couldn't refer to it as exclusive jurisdiction.

Tr. 7/10/96 at 26-27.

⁸¹ New York stated:

New York will show that the fact that the 1834 commissioners used the word "present" in describing New York's jurisdic-

But New Jersey goes further and asserts that “present” is also a geographical limitation on the size of Ellis Island in 1834. This would suggest that Article Second somehow determines sovereignty over the much later landfill, which was certainly not contemplated or discussed at the time. The Compact does not decide sovereignty over the landfill. It makes more sense to read “present,” as New York does and New Jersey does in part, to refer to the fact that Ellis Island was owned and operated by the United States at the time of the 1834 Compact, whereas the other islands were not. This means that the word “jurisdiction,” whether present or exclusive, is territorial in Article Second but not in Article Third.

In short, the Compact settles only the question of which State was sovereign over the 1833 Island; it does not address the question of which State has sovereignty over *an expanded Ellis Island*. That question is resolved pursuant to the age-old common law doctrine concerning the effect of avulsion and accretion on legal territorial boundaries.

tion over Ellis and Bedlow’s islands, and the word “exclusive” in describing New York’s jurisdiction over “the other islands,” has nothing to do with the geographical size of New York’s jurisdiction. Rather by this careful selection of adjectives, the commissioners recognized that in the 1800 and 1808 cessions New York had specifically conveyed partial jurisdiction over Ellis and Bedlow’s islands to the federal government, while retaining full jurisdiction over the “other islands.”

Def.’s Pre-Trial Mem. of Law at 11-12 (“N.Y. Pre-Trial Mem.”) (June 26, 1996) (DI 329); *see also* N.Y. Post-Trial Mem. at 15.

The compactors used the term “present jurisdiction” under Article II when referring to the jurisdiction over Bedloe’s and Ellis Island because prior to 1834, New York had ceded partial jurisdiction over both Ellis and Bedloe’s islands to the United States government, whereas the other islands alluded to under Article II, New York has ceded no jurisdiction to anyone.

Tr. 7/10/96 at 169 (Mr. Hughes for New York).

(2) New York's Theory Of The Shifting Interstate Boundary

New York advances the theory that New Jersey's eastern boundary is defined by New Jersey's ever-shifting shoreline due to her unlimited (except by federal regulation) wharfing-out rights under Article Third, and that, beyond that shoreline, New Jersey has only a property interest on New Jersey's side of Article First's boundary. *See supra* Parts IV.B.2.a.(1)(c) and I.B. Thus, postulates New York, the sovereign line is to be determined by the extent of the wharves, docks, and improvements to New Jersey's shoreline. Her interpretation would create a jagged and indeterminate boundary line that would shift as New Jersey added to or removed her wharves or created new ones. This consequence counsels strongly against adopting New York's reading of the Compact.

Before trial, New York drew a conceptual distinction between imperium and dominion and relied on that distinction to support her theory that Article Third of the Compact reserved for New Jersey only property rights on New Jersey's side of Article First's boundary. N.Y. Pre-Trial Mem. at 4-6.

New York juxtaposed Articles Third and Fifth to argue that these "mirror images . . . give New York and New Jersey exclusive jurisdiction over areas located on the other's side of Article One's boundary." *Id.* at 8. Thus, she concludes, "the 1834 Compact treated New York as the sovereign and New Jersey as the subject concerning the West side of the Hudson River." *Id.* at 11; *see also* Tr. 4/11/96 at 22 (Mr. Hughes for New York: "[T]he mid-Hudson was not a jurisdictional line but rather a territory boundary line.") Indeed, urges New York, the object of the Compact was to say that the jurisdiction over the whole Hudson River up to the high-water mark to the Jersey shore would have been retained

by New York.³² New York's theory that she is sovereign to the shifting Jersey shoreline persisted after trial. See N.Y. Post-Trial Mem. at 9.

Article Third explicitly grants both States exclusive jurisdiction over different things: New York over the waters of the New York Bay and the Hudson and New Jersey over the wharves, docks, and improvements on her shore. Because New York's "exclusive jurisdiction" is subordinate to the boundary line created in Article First, the word jurisdiction here conveys powers less than territorial.³³ With regard to New Jersey's exclusive jurisdic-

³² At the start of trial, New York again declared, going back to colonial grants and the historical bases of the States' boundary dispute, the following:

[MR. HUGHES for New York:] . . . The evidence is also going to show, Your Honor, that in an effort to settle this dispute, the compactors [in 1833] drew a critical distinction between imperium, or jurisdiction, and dominion, or property.

. . . .

SPECIAL MASTER VERKUIL: Do these terms appear anywhere in the documents?

MR. HUGHES: They don't appear in the Compact. They appear in the 1920 Port Authority Commissioners' reports.

. . . .

SPECIAL MASTER VERKUIL: [Do they appear] in anything preceding the 1834 compact that might be relevant to it?

MR. HUGHES: Well; the concept of the separation of property and jurisdiction. I'm not sure that the two latin terms appear there, but that's really irrelevant.

Tr. 7/10/96 at 159-60. Later, New York reiterated that the conceptual distinction between those terms supports her theory that "New York was the sovereign on the western side of the Hudson River to the New Jersey shore from the grant and the King. It was New York who granted New Jersey, as the subject, the rights that we'll talk about under Article III." *Id.* at 161 (Mr. Hughes for New York).

³³ New York's grant of exclusive jurisdiction in Article Fourth explicitly mentions "quarantine laws" and "laws relating to passengers" whereas those explanatory limits are not mentioned in Article

tion over "wharves, docks and improvements," however, the term adds powers to territory over which she is sovereign. This term essentially clarifies that New Jersey reserves police powers on her existing or fast lands, while Article Third otherwise grants these powers to New York over the Bay and River.³⁴

New York conceded at trial that, under her reading, New Jersey can change her boundary at will. When New York produced her closing exhibit illustrating her theory of the differing meaning of "boundary" in the Compact, she drew a red area almost to New Jersey's eastern shore, representing New York territory, and a small yellow area representing New Jersey's wharfing-out rights. *See* App. C. When questioned, New York agreed that, under Article Third as New York would interpret it, New Jersey alone could alter that yellow area and the dividing line between the red and yellow areas, and therefore the interstate boundary:

MS. KRAMER [for New York]: . . . New York's sovereignty plainly runs from its own shores to the low water mark on the New Jersey shore, subject only to New Jersey's wharfing out rights and fishing

Third. Articles Sixth and Seventh also grant each State powers to serve civil and criminal process in certain circumstances on land or waters under the exclusive jurisdiction of the other. These are further explicit qualifications upon the power of the words "exclusive jurisdiction" and help demonstrate that, from that time to the present, the boundary line has been the more reliable demarcation point. In fact New York's own courts have concluded that legal jurisdiction over persons stops at the boundary line established by the Compact. *See, e.g., Bunge v. C & N Truck Leasing Inc.*, 329 N.Y.S.2d 458 (Civ. Ct. 1972); *see also* discussion *infra* Part IV.B.2.b.(3).

³⁴ This, of course, makes for a sensible jurisdictional alternative because New York had long controlled traffic in navigable water and sought to retain such control under the Compact. On the other hand, New Jersey and not New York could sensibly claim such jurisdiction over her wharves, docks, and build-outs.

rights and everything else, but primarily up to that yellow territory.

SPECIAL MASTER VERKUIL: So New Jersey would not be allowed to wharf out beyond the edge of the yellow line.

MS. KRAMER: Well, Your Honor, the yellow line is not drawn to scale. The yellow line is simply an illustration of what the Compact means. Theoretically, I suppose New Jersey could wharf out as long as the current U.S. Corps of Army Engineers decides that it can New Jersey could, if the Federal Government didn't object, I guess, theoretically, wharf out to Mars, but I don't think the Federal Government would allow it.

SPECIAL MASTER VERKUIL: But you wouldn't object, even though it's on your sovereign territory.

MS. KRAMER: I think, Your Honor, that if New Jersey wharfed out . . . and improved its territory, we would have to concede that they had the exclusive jurisdiction to do that under Article Three, Section Two.

SPECIAL MASTER VERKUIL: So you're saying the exclusive jurisdiction in Article Three, Section Two gives them sovereign power over the wharfs beyond the edge of this yellow line perhaps.

MS. KRAMER: We are saying that they have the right to wharf out . . . and that I don't believe it's the State of New York's position or right to determine how far they can wharf out. I think these boundaries, as we've established in this case, are established by the federal government . . . [which has] the overriding authority to determine the bulkhead and pierhead lines.

Tr. 8/15/96 at 4106-08. New York's view of New Jersey's boundary under the Compact as one that produces a different meaning at different locations on the

Hudson River and New York Harbor could easily produce an anomalous result.

Interpreting "exclusive jurisdiction" in Article Third to mean police or legal jurisdiction is the only reading of Article Third that prevents such serious anomalies. If New York were right that her territorial boundary shifts in jagged wharfing-out fashion to New Jersey's eastern shore under Article Third, it would contradict principles set out in key decisions of this Court. In effect, New York's "solution . . . would create a regime of continually shifting jurisdiction." *Georgia v. South Carolina*, 497 U.S. 376, 396 (1990). This does not "comport[] with . . . the respect for settled expectations that generally attends the drawing of interstate boundaries." *Id.* at 397 (citing *Virginia v. Tennessee*, 148 U.S. at 522-25). In that case Georgia argued that each time a new island appeared in the Savannah River, which divided the states, the boundary would shift because she was granted sovereignty over all islands in the River. This Court proposed a construction that limited Georgia's rights to islands in existence at the time the boundary was drawn in the Treaty of Beaufort, thereby avoiding "sudden changes in the boundary." 497 U.S. at 397. Under New York's interpretation, New Jersey could change the interstate boundary at will by wharfing-out further, or by removing a wharf, and thus impose a boundary change upon New York without the latter's permission. Such an interpretation should be precluded by the rationale of *Georgia v. South Carolina*.

New York's Compact reading is convoluted. It sacrifices clarity and certainty for interpretative advantage. These efforts by New York to reinvent what the term "boundary" means in Article First encourage instead a construction that favors a Compact boundary line as a single territorial line. If the drafters had intended to delineate five distinct boundaries, as New York argues, surely the Compact would have described this explicitly.

(3) Summary Of The Implications Of The Compact Reading

Although I believe the above analysis is the most reasonable interpretation of the Compact, it cannot be said that the Compact is unambiguous. Article Third may be internally consistent and capable of being harmonized with Article First, but it is awkwardly drafted. The Compact describes the States' rights and powers in the form of exceptions to sweeping, general rules: the sovereign authority delineated in Article First appears to be significantly qualified by the opening paragraph of Article Third, but that exception is qualified by the numbered exceptions, which themselves are qualified in some instances. Articles First and Third are thus layered, confusing, and somewhat redundant. If Articles Third and Fifth are not harmonized with Article First in the manner set forth above, however, the Compact is significantly self-contradictory, and even more awkwardly drafted.

Whether somewhat redundant or significantly self-contradictory, the Compact remains ambiguous. I thus turn to extrinsic evidence to clarify the Compact's meaning. This evidence supports the intrinsic reading of the Compact that I have found to be the most logical and reasonable.

b. *Extrinsic Evidence*

As this Court has counseled, where there are ambiguities to be resolved concerning the language of the Compact, extrinsic evidence may be employed to help determine meaning. Where neither State has offered a fully satisfactory interpretation based upon intrinsic evidence, further inquiry is justified. The most important extrinsic evidence is the negotiating history of the Compact set forth below, and the various reports of commissioners from 1807, 1828, and 1833 which describe each State's claims and counterclaims. These contemporaneous reports, a kind of "legislative history" to the Compact, are

probative and reliable.³⁵ Other important sources include statements and actions of state legislators and executive officers, and relevant judicial precedents, including decisions by this Court. Further enlightening information may be derived from actions by various federal entities with responsibility for Ellis Island. Finally, legislative history of the Port Authority amendment of 1921, which was drafted to supplement the Compact of 1834, provides compelling insights into the States' interpretation of the Compact.

(1) Review Of Prior Boundary Settlement Attempts

As explained above, the States had a long negotiating history prior to the 1833 agreement that became the 1834 Compact. The earlier disputes stemmed from the terms of the original Royal Grant of 1664, disputes that had not been resolved when the colonies became states. New York and New Jersey were not unique among the original thirteen states in this regard; it is estimated that ten of the thirteen had boundary disputes pending during the constitutional period, several of which invoked the original jurisdiction of the Court. *See generally* Charles Warrent, *The Supreme Court in United States History* (rev. ed. 1926).

A review of these earlier failed negotiations between the States of New York and New Jersey illuminates what

³⁵ Unlike legislative history, which typically includes statements proffered by legislators *after* a statute is passed that may not accurately reflect the debates, these reports were exchanged between the parties, referred to in the negotiations, and reported to their respective legislatures and governors *before* the Compact was drawn. Because of this process of deliberation and exposure and the fact that they represent the history of Compact negotiations, I believe these reports are more probative and reliable than traditional legislative history. *Cf.* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 29-37 (1997) (highlighting a variety of interpretative difficulties with judicial use of legislative history).

was at stake in the 1833 negotiations. The reports describing these negotiations were all submitted into evidence.

(a) *The 1807 Negotiations*

New York maintains that her hegemony over the Hudson River and the Bay of New York was the product of the Royal Grant of 1664 and the lesser (that is, non-royal) transfer to the proprietors of New Jersey that same year. New York held this view throughout the colonial and independence periods. In reporting that "all attempts to procure an amicable adjustment proved entirely abortive," the 1807 New Jersey commissioners acknowledged New York's stated claim to be "over the whole waters lying between the respective states, including shores, roads and harbors, within the natural territorial limits of New-Jersey." Report of the Commissioners at 3 (Oct. 30, 1807) (PE 199-221).

In 1807 New York justified her claims on the language of the Royal Grant referring to the boundary as defined "part by the main sea and part by Hudson's river." *Id.*, No. I, at 6. By this formulation, she claimed the entire Hudson to the *high-water mark* of the New Jersey shore. The term "main sea," however, provided comfort for New Jersey because it created an ambiguity with respect to sovereignty over Staten Island. If the waters between that Island and the New Jersey shore (the Kill van Kull) were not the *main* sea, then New Jersey could make a claim to Staten Island even though New York had long been in possession. New Jersey argued that "Kill" means river in Dutch and therefore could not be interpreted as the main sea. See Report of the Commissioners, No. VII.

By the Montgomerie Charter of 1730, the New York colony had sought to place all of the Oyster islands as well as Staten Island and Long Island within the boundaries of the City of New York. Report of the Commissioners at

11; see also Dr. Leo Hershkowitz Expert Report, *Ellis Island, the "Soft Ozie Ground"* 16-17 (Oct. 16, 1995) (DE 938) (citing Jerold Seymann, *Colonial Charters, Patents and Grants to the Communities Comprising the City of New York* 281 (1939)); Thomas M. Pitkin, *Keepers of the Gate: A History of Ellis Island* 2-3 (1975).

The compromise proposals came to a head in an exchange of letters on October 6, 1807. New Jersey offered to forego her claims to Staten Island and the Oyster Islands in return for an acknowledgement that the boundary between the States was in the middle of the Hudson and the Bay. See Report of the Commissioners, No. XV, at 54. New York rejected this compromise and offered "use" jurisdiction over the contested navigable waters, subject to New York's "laws of quarantine" and police-power jurisdiction. See Report of the Commissioners, No. XVI, at 55-56. New Jersey's final rejection reads as follows: "[I]t is not for the state of New Jersey to ask and receive *benefits* from the State of New York" Report of the Commissioners, No. XXI, at 58. Here the 1807 settlement attempts end.

The States' dispute also implicated issues of *jus publicum*, that is, whether navigable waters are open to all traffic no matter what private claims are asserted over them. Report of the Commissioners, No. II, at 17. As discussed above, this issue became increasingly important with the advent of steamboat commerce on these waters. See *supra* Part II.A. The 1807 attempts at compromise foundered over these issues, as New York resolved to maintain her claimed royal prerogatives over navigable waters.

This review of issues raised in early negotiations is helpful in addressing ambiguities in the 1834 Compact because it amplifies today's claims. New York's commissioners stated that "we conceive the subject of the present reference to be a question of boundary and resolving it-

self into three questions. Whether New Jersey is to be restricted to high-water mark? Or whether she is to extend to low-water mark? Or whether she is to extend to the channel?" Report of the Commissioners, No. VI, at 34. After describing these boundary issues, New York declares "there was no reputation or understanding as to a boundary or line of jurisdiction" with respect to the waters between Staten Island and New Jersey. *Id.* at 36. Use of the term "boundary," however, abounds in the written exchange between the States, each time in its sovereign sense of marking territorial lines.

(b) *The 1827 Negotiations*

In 1827 the States again appointed commissioners to resolve their dispute. See Report of the Commissioners of New York, Senate Report ("Senate Report") (June 26, 1828) (PE 280-92). The States both described the purpose of their efforts as the establishment of "territorial lines." The first meeting was set in Newark on August 1, 1827, after which they agreed to exchange positions to be discussed at Hoboken on August 3. There, New York offered a single proposition to New Jersey: exclusive jurisdiction over land and wharves on the west shore of the Hudson; provided such wharves or piers did not obstruct navigation. New Jersey, in turn, countered with three propositions: (1) a "boundary" line down the middle of the Hudson and Bay (to include Staten Island); (2) "concurrent" jurisdiction in the navigable waters established by such boundary line; and (3) "the islands called Bedlow's Island, Ellis' Island, Oyster Island and Robins Reef, *to the low water mark of the same*, be held to be and remain within the exclusive jurisdiction of the state to New-York." *Id.* at 3 (emphasis added).

No agreement having been reached on these propositions, the States exchanged further proposals in Newark on August 6. New York expanded her list as follows:

(1) New Jersey to enjoy "the fisheries on the west side of the Hudson river, . . . and in the waters between Staten Island and New-Jersey"; (2) exclusive jurisdiction over wharves (as before) but with additional control over all land *to the low-water mark*; and (3) rights to serve criminal process upon persons or things in the waters of the Hudson. *Id.* at 3-4.³⁶ New Jersey countered with three propositions: (1) the waters of the Hudson and between Staten Island and the main land of New York to be the boundary, with claims to Staten Island explicitly relinquished; (2) New York to have "exclusive jurisdiction" over the waters of the Hudson; and (3) New Jersey to have exclusive jurisdiction over the waters between Staten Island and mainland, with service of process rights reserved for New York.

Again unable to agree, the States met in Albany on April 13, 1827. Further propositions were exchanged over the following week, but New Jersey's ultimate goal of securing her boundary claim continued to be denied by New York. New York did grant New Jersey further rights to serve process on her side of the Hudson, but New Jersey saw these as inadequate concessions. *See* Senate Report, Letters of Sept. 15, 1827, *et seq.* Thus, by 1828, efforts at compromise once again foundered. The *New Jersey v. New York* case was filed in this Court shortly thereafter.

This history is probative in two key respects. One, it underscores that the purpose of the original suit between the States and thus the Compact negotiators themselves was to set a sovereign boundary between the States. Two, because the earlier exchanges reveal that the States contemplated jurisdictional trading in each other's domains, it strongly supports New Jersey's argument that "jurisdic-

³⁶ These process rights were also exchanged over the waters in the Compact of 1834. *See* Articles Sixth and Seventh (App. A).

tion" as used in the Compact, even "exclusive jurisdiction," has variable meanings, and does not necessarily connote sovereignty.

(2) Review Of Related Jurisprudence

(a) *The Supreme Court's Interpretation Of The Compact: Central Railroad Co. v. Mayor of Jersey City*

My conclusions in this Report draw support from *Central Railroad Co. v. Mayor of Jersey City*, 209 U.S. 473 (1908). Because that case interpreted the Compact at the time Ellis Island was expanding, it has obvious relevance to the case at hand. *Central Railroad* involved the issue of Jersey City's taxing authority over the wharves that extended into New Jersey's side of the Hudson River. Because neither State was a party, and Ellis Island was not at issue, the decision is not the law of the case. Nonetheless, it persuasively addressed issues, notably the meaning of boundary in the Compact, that are central to this case.

Mid-way between the adoption of the Compact of 1834 and the commencement of this litigation in 1993, Justice Holmes concluded for a unanimous Court that the terms "boundary," "territory," and "sovereignty" were interconnected, while the word "jurisdiction" conveyed several meanings. Justice Holmes rejected the theory New York now advances that Article Third simply grants New Jersey property rights on her side of the Hudson River, overriding the boundary delineation in Article First. He stated for the Court:

It appears to us plain on the face of the agreement that the dominant fact is the establishment of the boundary line. The boundary line is the line of sovereignty, and the establishment of it is not satisfied, but is contradicted, by the suggestion that the agree-

ment simply gives the ownership of the land under water on the New Jersey side to that state as a private owner of land lying within the state of New York. On the contrary, the provision as to exclusive right of property in the compact between states is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits, which was declared to be one purpose of the agreement, and is not to be confined to the assertion and recognition of a private claim, which, for all that appears, may have been inconsistent with titles already accrued, and which would lose significance the moment that New Jersey sold the land. We repeat that boundary means sovereignty, since, in modern times, sovereignty is mainly territorial, unless a different meaning clearly appears.

Id. at 478-79.

This passage addresses several relevant issues. First, Justice Holmes's equation of the concepts of territory, boundary, and sovereignty comports with my conclusion that the overriding purpose of the enterprise was to draw the territorial boundary between the States. But Justice Holmes also helps tie together the potentially ambiguous terms "jurisdiction" and "property" that appear in Articles Second and Third. By this analysis, Article Third simply reaffirms that this is New Jersey's sovereign territory while ceding certain aspects of political jurisdiction to another sovereign. He refuses by that reading to allow the property rights granted to New Jersey in Article Third to contradict or limit the boundary set out in Article First.

New York has seized upon Justice Holmes's last quoted phrase ("unless a different meaning clearly appears") as a potential escape from the conclusion that boundary equals sovereignty. *See, e.g.,* N.Y. Post-Trial Mem. at 12-13. But that phrase is a cul de sac, not an escape hatch. It allowed Holmes to reject the argument that Article Third, in giving New York "exclusive jurisdic-

tion" over the water and lands under it on the New Jersey side of the boundary established in Article First, somehow contradicted or retracted the sovereign power accorded to New Jersey in Article First. Reasoning that jurisdiction had to mean "something less" than sovereignty in this Article Third, Justice Holmes concludes that the term referred primarily to "commerce and navigation" over the Bay and River, police-power activities that New York had historically exercised. In my view, Justice Holmes's opinion for this Court on the meaning of the Compact has stood the test of time.

The *Central Railroad* decision reiterates that a state's control over some aspects of jurisdiction such as safety and public health (for example, quarantine restrictions) has long been recognized even in situations where other forms of legal jurisdiction were not. In *Gibbons v. Ogden*, for example, Chief Justice Marshall carefully acknowledged New York's continuing role over what might be termed harbor and river management, even while preempting her monopoly over steamboat traffic. See 22 U.S. at 234-38. The exercise of these powers by New York later helped produce in 1921 the Port Authority amendment to the 1834 Compact. This amendment is also relevant extrinsic evidence in determining Compact meaning. See *infra* Part IV.B.2.(b)(3).

(b) *Other Courts' Interpretations Of The Compact*

The States, like Justice Holmes in *Central Railroad*, rely in part upon decisions of each of their courts that have interpreted the relevant language of the Compact. New Jersey argues, for instance, that New York is bound by the decision of her own court of appeals in the *People v. Central Railroad* case discussed below, which supported Holmes's analysis that boundary divides sovereign territory.

These state-court decisions are not binding in this case. The construction of a compact sanctioned by Congress presents a federal question. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959); *Delaware River Joint Toll Bridge Comm'n, Pa.-N.J. v. Colburn*, 310 U.S. 419, 427 (1940). The general rule is thus that neither the decisions of the courts of the respective states to the controversy nor the decisions of the federal courts of appeals are binding precedent. *Georgia v. South Carolina*, 497 U.S. at 392; *Durfee v. Duke*, 375 U.S. 106, 115-16 (1963). At the same time, this Court has, on occasion, noted the relevant holdings of state courts, especially where they are persuasive and informative. See, e.g., *Mississippi v. Arkansas*, 415 U.S. 289, 291 n.4 (1974); *Ohio v. Kentucky*, 444 U.S. 335, 340 (1980). With this in mind, I analyze the significant cases cited by the States.

In *People v. Central Railroad Co.*, New York's Court of Appeals—like Justice Holmes later—noted how ironic the 1834 Compact would have been if it sought to take away in Article Third the very territorial powers set out in Article First. The attorney general of New York sued “to abate as nuisances, and cause the removal of certain wharves, bulkhead, piers, and railroad tracks, and other erections, placed by [New Jersey] . . . in the harbor of New York . . . and the Hudson River, about a mile from the New Jersey shore” on the basis that these were within New York's jurisdiction. *Id.* at 284. Interpreting the Compact of 1834, the New York court held that, because the territorial boundary was drawn down the middle of the waters between the States, and because Article Third gave New York only limited jurisdiction, that is, “police jurisdiction of and over all vessels, ships, boats or craft of every kind that did or might float upon the surface of said waters,” *id.* at 299-300, New York courts “have no jurisdiction to restrain the erection, or order the removal of structures extending into the bay or river from the New Jersey shore,” *id.* at 283.

The New York court was unequivocal in its interpretation of the Compact. With respect to Article First, the court declared:

The language of this article is certainly very clear and explicit. Aside from the *exception* at its close, it leaves no room for constructive doubt. . . . It fixes definitely the boundary line . . . at or in the middle of the Hudson river, and of the Bay of New York. . . . It relinquished, in legal effect, whatever right or claim [New York] formerly had to the bed of the Hudson river [in New Jersey territory].

Id. at 292. The court noted further that the Compact "yielded the precise point in controversy" between New York and New Jersey in the 1829 original jurisdiction case in this Court, quoting New Jersey's complaint in that case. *Id.* at 292-93. Said the New York court: "The boundary line, it appears, is thus established between the two states, precisely as prayed for by New Jersey in the said [1829] bill of complaint, at and in the middle of the Hudson river and other waters therein mentioned." *Id.* at 293. This, added the New York court, established unequivocally that Article Third gave New York limited jurisdictional rights in New Jersey's waters: "It clearly could not have been the intention [in Article Third] . . . to re-cede to New York what had just been relinquished in respect to the boundary between the two states in the first article or to nullify the force of such article. . . ." *Id.* at 296. New Jersey's sovereign rights had been "so long and so earnestly and persistently claimed by New Jersey, and thus so formally renounced by [New York] . . . in the first article of said treaty." *Id.* at 298. Having so concluded, the New York court found the three subdivisions of Article Third "to have been entirely unnecessary." *Id.*; see also *Ferguson v. Ross*, 27 N.E. 954 (N.Y. 1891) (similar analysis).

The Supreme Court of New Jersey in the *Central Railroad* case adopted a similar view. After reviewing pre-

Compact history and the implementing statutes of both States, Judge Garrison declared, unequivocally, that "boundary" in Article First means sovereignty; that sovereignty is separate from jurisdiction in the Compact; and that subsequent articles contain exceptions to jurisdiction:

[T]he question at issue between [the two states] was, in its ultimate essence, one of sovereignty. . . . That this was recognized by each State in providing a modus of settlement is evident from the language of the statutes by which the respective commissioners were appointed and empowered. . . . In plain terms, therefore, the Commissioners were empowered to negotiate respecting two things, and thereby to settle two things, namely, limits of territory and jurisdiction. Nowhere is there any intimation that those two were deemed to be one and the same thing. Bearing this fact in mind, and that the main point in controversy was that of sovereignty, the Compact itself may be [used accordingly]. . . .

Central R.R., 56 A. at 243. Later, the New Jersey court made clear that the "limits of territory" were sovereign, not pure property, limits:

The grounds for thinking that sovereignty is disposed of under the head of "Territorial Limits" rather than under that of "Jurisdiction" are several and various. In the first place, the legislative direction to each set of commissioners was to deal with both territorial limits and jurisdiction, which was the merest tautology if the jurisdiction referred to was in itself sovereignty. In the next place, the commissioners did, in several instances, deal with jurisdiction in its juridical sense, a matter to which they were in no wise empowered if the term "jurisdiction," used in the statutes under which they were appointed was governmental. Furthermore, the facts that sovereignty was the main point at issue, that territorial limits preceded jurisdiction in the enumeration of the commissioners' authority, and that the first article

dealt conclusively with the question of territorial limits, are all indications that in dealing with this power the commissioners were settling the main point at issue. More conclusive still is the circumstance that having, in article 1, settled the matter of territorial limits, the jurisdiction with which the commissioners dealt was excepted from it, which is perfectly rational if the jurisdiction was juridical, and hence a mere incident of sovereignty; but was palpably irrational, not to say inconceivable, if jurisdiction was of itself that very sovereignty.

Id. at 244.

One other New Jersey decision, however, is notable for its contradictory conclusion. In *State v. Babcock*, 30 N.J.L. 29, 33-34 (Sup. Ct. 1862), Justice Elmer, who had served as a New Jersey commissioner during the 1833 negotiations, expressed reservations about the interpretation subsequently given the Compact by New York's courts. Justice Elmer's interpretation emphasizes New Jersey's property rights rather than sovereign rights in Article Third. At the same time, it also describes New York's police-power jurisdiction over the entire Bay and River. His interpretation is thus not entirely at odds with the intrinsic reading detailed above. To the extent his opinion is offered as evidence of the commissioners' intent, moreover, his post-hoc comments are not particularly probative. This Court has reasoned with regard to extrinsic evidence of legislation that "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent." *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974); see also *United States v. United Mine Workers*, 330 U.S. 258, 281-82 (1947) (finding remarks of legislator made eleven years after passage of act not probative of intent of drafters).

A recent Second Circuit decision that was a catalyst for filing this case also interpreted the Compact in New

York's favor. *Collins v. Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992) held that New York's workers' compensation laws applied to an injury on the landfilled portion of Ellis Island. The court thus determined that New York was sovereign over that territory and rejected Justice Holmes's reasoning in the *Central Railroad* litigation. While a recent decision of the court of appeals is important, its analysis is far less probing given that the sovereignty issue has been the subject of a full trial in our case. The *Collins* result made for easier management of workers' compensation claims on Ellis Island, but I find its reasoning unpersuasive on the boundary issue. Although they appeared as amici, the States were not parties to that case, nor was it an original action. Thus, the decision is not binding on the parties here. As this Court has admonished: "[T]his Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved." *Georgia v. South Carolina*, 497 U.S. at 392.

(3) The Port Authority Amendment of 1921

New York and New Jersey established a bi-state commission in 1917 to explore greater cooperation in operating their respective ports and related transportation arteries. The findings of the New York, New Jersey Port and Harbor Development Commission ("Commission"), set forth in the report discussed further below, led to the enactment of the Port Authority of New York and New Jersey amendment to the Compact of 1834. See N.Y. Unconsol. Laws §§ 6401, *et seq.* (McKinney 1979); N.J. Stat. Ann. §§ 32:1-1, *et seq.* (West 1990). The Port Authority amendment set boundaries for a "Port of New York district" and was approved by Congress on August 23, 1921. See Sen. Joint Res. 88, 67th Cong., 1st Sess. (1921); see generally Frankfurter & Landis, *supra* at 696-97 (describing the evolution of the Port Authority amendment); *Hess v. Port Auth. Trans-Hudson Corp.*, 115

S. Ct. 394, 398 (1994) (referring to creation of the Port Authority of New York and New Jersey). The conclusions they reached during this process are relevant to each State's operating assumptions under the Compact.

The Supreme Court has noted that such assumptions are relevant. In *Vermont v. New Hampshire*, 289 U.S. 593 (1933), for example, the Court relied in part on the "practical construction" given by both states to the boundary that the Court held properly divided the states. As evidence of this "practical construction," the Court pointed to, inter alia, the fact that certain towns in New Hampshire recognized the low-water mark on the west bank of the Connecticut River as the town and state's boundary. The Court regarded the town's actions as having "some persuasive force." *Id.* at 615. Similarly, as discussed below, the Commissioners who drafted the bi-State reports for the Port Authority amendment regarded interstate cooperation as necessary in the Port of New York in part because the territorial boundary between the States ran down the middle of the Hudson River and the Bay. Thus, while not dispositive, the "practical construction" of the boundary evidenced in these reports is of "some persuasive force" in affirming that Article First describes the territorial boundary between the States, which informs the analysis of sovereignty over Ellis Island.

(a) *Legislative Background*

Although the documents describing the Commission's findings and the text of the Port Authority amendment do not discuss Ellis Island specifically, they are relevant in two respects: they support New Jersey's interpretation of "boundary" in the 1834 Compact; and they buttress her argument against New York's claim of prescription during this period. The most voluminous and earliest of the legislative materials is the full text of the Report of the Commission. See *N.Y. Legis. Docs.*, 142d Sess., No.

103 (1919). The Report was addressed to the governors of New York and New Jersey, Alfred E. Smith and Walter E. Edge, respectively, and was submitted to the New York legislature by Governor Smith on April 14, 1919.

The Report, as well as the summary of the Report submitted to the governors of the States in 1920, supports New Jersey's interpretation of the word "boundary" in the 1834 Compact. The indirect evidence lies primarily in Appendix B of the Report, titled "Preliminary Report of Counsel to Accompany the Tentative Draft of Proposed Treaty Amendatory and Supplementary to the New York-New Jersey Treaty of 1834." The Preliminary Report sets out in detail the early commercial relations between the States, explaining that the "boundary dispute" was framed for purposes of the 1833 negotiations by the advent of the steamboat and the concomitant monopolies it produced. *See* Report at 71-76. Later in the Preliminary Report, discussing the treaty-making power of the States, counsel to the Commissioners ("Counsel") explain that

[i]f the compact or agreement between the States does not affect the political power of either, it would seem, therefore, as though approval by Congress were unnecessary. The treaty between New York and New Jersey of 1834, however, was approved by Congress. That treaty did seriously affect the political relations of the two States, and as we have seen . . . settled and disposed of a matter that had been the subject of serious controversy between the two States.

Report at 162. Counsel thus interpreted the Compact as having set a sovereign boundary, which they made clear was at issue prior to 1833.³⁷

³⁷ The legislative history of Congress's approval of the Port Authority Act is not probative. The relevant history merely acknowledges the Report filed by the Commission without analyzing

Similarly, in the same discussion, Counsel note that the 1834 Compact contemplates the exercise of extra-territorial jurisdiction, consistent with an interpretation of the Compact drawing the boundary as set out in Article First of the 1834 Compact. They state:

If a State may alienate a part of its territory in perpetuity to an individual, it may, of course, alienate to another State. This is the theory underlying all boundary treaties. Each State grants and conveys to the other—or releases, as the case may be—all its right, title and interest in the property on the other side of the boundary. . . . But we are not to change in any respect the boundary lines between New York and New Jersey as settled by the Treaty of 1834. *We are simply to vest sovereign authority within a certain portion of territory in both States, and such sovereign authority only to a limited degree, sufficient to accomplish the main purpose. This is already done in the Treaty of 1834.*

Report at 164 (emphasis added). This allusion to the 1834 Compact supports New Jersey's view that the "jurisdiction" conferred in Article Third of the Compact does not undermine the sovereign boundary set out in Article First, but rather confers on New York certain powers of jurisdiction in New Jersey's sovereign territory. Consistent with Counsel's analysis, Article Third vests "sovereign authority only to a limited degree" over the otherwise sovereign territory delineated in Article First.

Counsel in the excerpt above refer to "boundary lines," in the plural, which New York uses to support her contention that the Compact does not set merely a single boundary. "Boundary lines" as used above, however, should logically be read in context as describing the boundaries of the States distinctively in both the Hudson

it and focuses more generally on the benefit the Port Authority Act would work for the entire nation. See 61 Cong. Rec. 4920-21 (1921); see also *id.* at 8589-90 (remarks of T. Frank Appleby as to the benefits of the Act in both New York and New Jersey).

River and New York Bay under Article First; the plural may also be reasonably interpreted to describe the boundaries of each State's respective extra-territorial jurisdiction. There is no intrinsic or extrinsic support for New York's view on the meaning of the term.

In at least two other parts of these legislative documents, moreover, the Commissioners clearly adopt an interpretation of the 1834 Compact that is inconsistent with New York's theory. First, the Preliminary Report analyzes Justice Holmes's decision in *Central Railroad Co. v. Mayor of Jersey City*. In particular, Counsel quote the case as follows:

"But we agree with the state courts that have been called on to construe that part of the agreement, that the purpose was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article I. This is the view of the New York as well as of the New Jersey court of errors and appeals, and it would be a strange result if this court should be driven to a different conclusion from that reached by both the parties concerned."

Report at 79. One would certainly expect that if Counsel disagreed with Justice Holmes's interpretation they would have noted as much, given that it related to the respective sovereignty of the States, an issue so fundamental to the Port Authority amendment.

Second, New Jersey's interpretation of the 1834 Compact is clearly adopted in the "Summary of Joint Report with Comprehensive Plan and Recommendations" ("Summary"), submitted to the governors of New York and New Jersey on December 16, 1920. See *N.Y. Legis. Docs.*, 144th Sess., No. 33 (1921). In the Summary, the Commissioners discuss the "Geography of the Port,"

and in particular the "Political Geography." *Id.* at 12-13. The Commissioners begin their analysis by noting that "[t]hrough the Hudson River and the Upper Bay runs the State line between New York and New Jersey," *id.* at 13, an interpretation of the Compact congruent with New Jersey's. This suggests that "boundary lines" meant the lines in the Hudson River and in the New York Bay under Article First, not the tortuous set of boundary lines proposed by New York in her post-trial brief.

The Report also mentions the Compact of 1834 in its discussion of the "Treaty-Making Power of the States and What May Be Done Under It." Report at 161. Counsel analyze the "North Atlantic East Fisheries Case" before the Hague Tribunal for the purpose of showing that a sovereign state may subject its territory to a myriad of obligations which do not derogate from the state's sovereignty. *Id.* at 169-72. The Commissioners point to a colloquy before the Tribunal in which one of the participants states that "'general sovereignty is a thing wholly apart and not affected by the grant of particular territorial rights.'" *Id.* at 172. Counsel then state:

Indeed, we may say that the framers of the treaty between New York and New Jersey of 1834 had clearly in mind this distinction between the preservation of general sovereignty and governmental functions and the grant of title to land, the distinctions between the title to the land under water, which, in the case of New Jersey, extends to the middle of the stream, and the exercise of *governmental police power*, which is granted to one State even to the shores of the other.

Id. (emphasis added). This discussion reveals Counsel's understanding that the 1834 Compact distinguished between jurisdiction and sovereignty. It also supports New Jersey's view that "present jurisdiction" in Article Second referred to the police powers New York reserved to her-

self when she ceded the pre-1834 Island to the federal government.

(b) *Text Of The Amendment*

The text of the Port Authority amendment (while also not specifically mentioning Ellis Island) also supports New Jersey's interpretation of "boundary." The purpose of the Compact amendment is described as follows:

Whereas in the year 1834 the States of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two States in and about the waters between the two States, especially in and about the bay of New York and the Hudson River; and

Whereas since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district

. . . .

. . . Now, therefore, The said States of New Jersey and New York do supplement and amend the existing agreement of 1834 in the following respects

N.Y. Unconsol. Laws § 6401; N.J. Stat. Ann. § 32:1-1. Article 20 of the Act refers to the 1834 Compact as follows: "The territorial or boundary lines established by the agreement of 1834, or the jurisdiction of the two states established thereby, shall not be changed except as herein specifically modified." N.Y. Unconsol. Laws § 6421; N.J. Stat. Ann. § 32:1-21. The Preamble and Article 20 of the Act thus suggest an important awareness about the meaning of two crucial terms in the 1834 Compact: boundary and jurisdiction. By equating boundary and not jurisdiction with territorial lines, and by using the disjunctive to separate boundary and territory on the one hand from jurisdiction on the other hand, the 1921

amendment endorses New Jersey's view of the word "boundary."

The significance of the 1834 boundary line also was accepted by the New York courts after the 1921 amendment. On several occasions they refused to read the Port Authority amendment as modifying the 1834 boundary line between the States. In *Bunge v. C & N Truck Leasing, Inc.*, 329 N.Y.S.2d 458 (Civ. Ct. 1972), for example, the New York court was faced with a suit over an accident that occurred at a New Jersey toll plaza on the George Washington Bridge. The defendant moved to dismiss the complaint for lack of jurisdiction. The court granted defendant's motion, citing earlier cases that established the state boundary line in the middle of the Hudson River. See, e.g., *Clarke v. Ackerman*, 278 N.Y.S. 75 (App. Div. 1935). The *Bunge* court stated:

The conclusion that I reach is that the compact confirmed the underlying jurisdictional premise of the treaty, that the boundary line between the two states is the middle of the Hudson River, and explicitly affirmed that the creation of the Port Authority did not modify the jurisdiction of either State. There is no persuasive reason, in my view, in the light of the text of the compact and the precedents for deciding that the compact changed the concept that the jurisdiction of the courts of each state extends to but not beyond the middle of the Hudson River.

329 N.Y.S.2d at 460.⁸⁸

New York's judicial opinions after the 1921 amendment confirm that State's acceptance of the essential point that the amendment endorses the boundary line established by the Compact in 1834.

⁸⁸ The George Washington Bridge is located at that part of the boundary which New York's counsel claims in her five-part boundary description was meant to be in New York's territory. See App. B. The *Bunge* court's opinion thus appears to contradict New York's legal theory.

C. Conclusions From Compact Analysis Based Upon Intrinsic And Extrinsic Evidence

In 1829 the original jurisdiction of this Court was invoked in *New Jersey v. New York* to resolve a boundary dispute. Boundary relates to territory or sovereignty. The resulting settlement negotiations, which led to the Compact of 1834, were prompted by that lawsuit. Article First is thus first for a reason: it establishes the interstate boundary line in logical order.

The other articles, including Articles Second and Third, must be read consistently with Article First, not the other way around. The word "boundary" is used only once in the 1834 Compact while "jurisdiction" appears numerous times in the preamble and in other articles of the Compact. "Jurisdiction" is sometimes qualified by "exclusive" and once by "present." Jurisdiction, in this setting, denotes different meanings in different contexts. The subsequent articles create exceptions for each State to the jurisdictional attributes of sovereignty in the other's sovereign territory as declared by Article First.

The "present jurisdiction" term of Article Second accords New York sovereignty over the Island at the time of the Compact and thus locates the 1833 boundary. Neither Article Second nor any other provision of the Compact addresses the question at issue—which of the two States is sovereign over the landfill additions made to Ellis Island after the Compact. Rather, that extra-Compact question must be decided under principles of common law to be explored next. This understanding and analysis of the Compact's terms as they affect the interstate boundary in general and on Ellis Island in particular are informed by both the intrinsic and extrinsic evidence set forth in this section.

V. SOVEREIGNTY OVER THE LANDFILLED PORTIONS OF ELLIS ISLAND: THE COMMON LAW OF ACCRETION AND AVULSION

New York's "present jurisdiction" over Ellis Island under Article Second of the Compact constitutes sovereign power over an entity within the territory of New Jersey. If Ellis Island were still the size it was originally in 1833, there would be no case before this Court. It is the enlargement of the Island that creates the controversy.

The Compact does not resolve the interstate boundary on an expanded Ellis Island because it treats the Island as it then existed. Subsequent changes to the size of the Island must be addressed through principles of common law then and now in effect. The common law of accretion and avulsion is the primary vehicle for the parties to determine sovereignty over the landfilled portions of the Island.

A. The States' Positions

New Jersey argues that the acreage added by landfill almost entirely after 1890 is her sovereign territory because it sits in her territorial waters, and on her underwater land. New Jersey also claims that the fill after 1834 was not wharfing-out but represented "the construction of [the] new and separate islands." N.J. Post-Trial Br. at 9 (Oct. 12, 1996) (DI 366). Further, argues New Jersey, since under Article Third she had the property rights of a sovereign to underwater lands on her side of the boundary, the 1834 Ellis Island could have extended only to the high-water mark of 1834. *Id.* at 11. The high-water mark boundary in 1834 is further evidenced by New York's 1808 deed of conveyance to the United States of around three acres. *Id.* at 12. As discussed below, *see infra* Part VI.D.3., New York's 1880 attempt to convey Ellis Island lands below the high-water mark to the United States was to no avail because in 1904 "the United States recognized that New York had no

authority to sell the lands and consequently obtained title to them from New Jersey." *Id.* The subsequent fill added by the United States is an avulsive change which did "not disrupt sovereignty." *Id.* at 15.

New York argues that even assuming New Jersey is right on the Article First boundary issue, the entire Ellis Island, by whatever means created, belongs to her under Article Second because there are no descriptive limits to the size of the Island contained in the Compact's grant of "present jurisdiction" (that is, no metes and bounds description or "fastlands" limitation). New York contends: "Had the commissioners, who were fully aware of the possibility of fill, really wanted to geographically limit New York's jurisdiction, they could have easily done so with simple, everyday language." N.Y. Post-Trial Mem. at 15-16.

New York posits that this conclusion is strengthened by Justice Holmes's reference to present jurisdiction as preserving "'the status quo ante, whatever it may be,'" *id.* at 16, and by the *Collins* decision. *Collins v. Promark Prods., Inc.*, 956 F.2d 383, 386 (2d Cir. 1992) (stating that "[t]he language of the Compact concerns power over the entity known as Ellis Island and in no way implicates the size of the entity").

New York City adds an argument that the State of New York did not attempt to make. The City argues that under common-law principles the filled portions of Ellis Island are rightfully New York's because an upland owner may make extensions and add fill to his property beyond the low-water mark, provided such extensions and fill do not prejudice "the common rights of navigation or fishery, or violate the reasonable needs of the public interest." The City Post-Trial Br. at 21-22 (Oct. 12, 1996) (DI 367).

B. Discussion

New York's position raises the question of what the States would have contemplated in 1833 if Ellis Island were to grow to many times its "original" size. After all, the Island ultimately grew by more than nine times the size of the original fast land. Would no limits have been contemplated on the ultimate size of the Island over which New York had jurisdiction? One could speculate that New York, by this theory, would be sovereign over an ever-expanding Ellis Island on New Jersey's underwater territory. Under this interpretation of the Compact, and subject only to navigational restrictions, New York theoretically could add to her territory an area as large as Governors Island within New Jersey's sovereign territory. I am unpersuaded the Compact accommodates this possibility. If such territorial expansion of a small island were contemplated in 1833, some references to it would logically have been set forth in the 1834 Compact. Silence cannot bear such interpretative weight.

I therefore agree with New Jersey that the Compact does not address expansion by landfill,³⁹ and also with the *Collins* court's conclusion that the Compact language does not "implicate" or resolve the size of Ellis Island. Justice Holmes's reference to "status quo ante" in *Central Railroad Co. of N.J. v. Mayor of Jersey City*, 209 U.S. 473 (1908) also does not resolve this question. The cases do not focus on the issue of which State has jurisdic-

³⁹ New York argued during trial that, at the time of the Compact, the use of fill on islands in the harbor and on the Manhattan or Jersey shores was already an accepted practice. Tr. 7/23/96 at 1594-1601; N.Y. Post-Trial Mem. at 15 (Oct. 3, 1996) (DI 365). New Jersey disputed these claims. Tr. 7/23/96 at 1596-97. I find the evidence too ambiguous to permit a factual finding that the practice of fill or wharfing-out had been established and thus taken for granted during that time. In any event, given the scheme of the Compact, the absence of any allusion to such practices in the Compact, and this Court's application of the doctrines of accretion and avulsion in original jurisdiction cases, such a finding would not affect my analysis.

tion over the expanded areas of Ellis Island; they are Compact interpretation cases, and the Compact itself did not resolve that question. This is understandable because, in 1833, bigger issues were at stake for the Compact drafters. Indeed, the "grand scheme" of the Compact was to declare territorial rights to the Bay of New York and most of the Hudson River, as well as large land masses like Staten Island, not to speculate on the growth potential of the small islands in the Harbor.

1. *Collateral Factors*

Before turning to the relevant legal principles that address the landfill issues, some collateral factors must be noted. These include the intertwined role of three sovereigns on the Island, the fact that Ellis Island at one point was three distinct islands, and the relevance of "wharfing-out" to the present size of the Island.

a. *The Presence Of Three Sovereign Entities*

Three, not two, sovereign entities are involved on Ellis Island. The United States, by deeds of 1808 from New York and 1904 from New Jersey, is owner of Ellis Island; New York, by Article Second of the Compact, retains sovereignty over the 1833 Island; and New Jersey under the Compact, particularly Article First, is sovereign over the waters around the Island. The additions to the Island after 1890 were made by the United States, not New York, and the United States received a deed from New Jersey for nearly all of those underwater lands. I note this here to alert the Court even though I do not believe that it has any impact upon the accretion and avulsion analysis. Instead, the three-sovereign question will bear heavily upon the discussion of prescription and acquiescence in the next section.

b. One Island Or Three Islands

At trial, the States argued over whether Ellis Island was one island or three islands during the period of land-filling. This fact could be relevant to the decision if the Compact is interpreted, as New York argues, to grant sovereignty over an enlarged Island. In this event, if Ellis Island were at some point three islands rather than one island, the case for limiting New York's claim to the first and original island would be made. New York would be hard-pressed to claim that she was also sovereign over separate islands added to New Jersey waters in the Bay. There is no basis anywhere in the Compact for New York to claim sovereignty over new islands in New Jersey's sovereign waters. New Jersey made this point:

[MR. YANNOTTI for New Jersey]: In these documents, the separate land masses are referred to as islands one, two and three

. . . .

Under New York's theory of the case, the Federal Government could have dotted the whole harbor with islands, and so long as they were called Ellis Island, New York would acquire jurisdiction over the territory.

Tr. 7/10/96 at 25.

Indeed, New York's counsel conceded during trial that an imaginary island emerging in the Hudson River on New Jersey's side of Article First's boundary might be New Jersey's sovereign territory under Article Second:

SPECIAL MASTER VERKUIL: Suppose the [hypothetical] island is between Bedlow's and Ellis Island. It's not connected. And it emerges like Atlantis out of the sea.

MS. KRAMER [for New York]: Like Mr. Cragin's island almost did, right?

SPECIAL MASTER VERKUIL: Whose Island is it? Then New Jersey has it, then that's Jersey's Island.

MS. KRAMER: Under Article Two, it would not be so clear. Under Article One, if New York's interpretation of Article One is accepted, New York would have it. But under Article Two, New York would not necessarily have it.

Tr. 8/15/96 at 4140.

I find that there were three islands for at least a brief period in time. New York's witness, Mr. Unrau, placed into evidence his Historic Structure Report, which is replete with evidence supporting this conclusion. The three land masses were initially separate and interconnected for purposes of communication by gangways built on pilings. Until they were later connected by fill, they were technically separate. Mr. Unrau stated, for example, that

[d]uring the 15 months that it operated the two hospital islands, the army constructed the covered way between islands 2 and 3 to provide a sheltered passage for communication between the two hospital complexes. Up to that time, the two islands had been connected by an uncovered trestle bridge about 500 feet long.

Harlan D. Unrau, U.S. Dep't of Interior/Nat. Park Serv., Historic Structure Report: Ellis Island, Statue of Liberty National Monument, New York-New Jersey 468 (1981) (DE 952); *see also id.* at 415, 416, 491, 503-04, 505 ("the proposed additional island"), 506 ("a new island," "land newly built"), 507 ("proposal for a new island . . . 410 feet from the present island and with 200 feet of clear water space between the two islands"), 508 ("In July the boundaries of the new island were staked out."). Tr. 7/26/96 at 2225-35. New York's witness, Dr. Squires, testified that Islands Two and Three were con-

nected by a "breakwater" built of pilings, and conceded that "a breakwater constructed in that manner is not fill." Tr. 8/2/96 at 3067. Mr. Unrau attempted to discount his earlier descriptions of three separate islands by claiming it was a designation used for "administrative convenience." Tr. 7/26/96 at 2226; *see also* Tr. 8/8/96 at 3551-54 (Mr. Unrau hedged on the divergence between his trial testimony and his written description before trial). I am more convinced by the precise and detailed references described in his report written prior to litigation.

Much of the dispute at trial over whether Ellis Island was in fact one or three islands centered on how one views the water running between Islands Number One and Two in a photograph which the Court can review in Appendix E. The testimony of New York's expert, Dr. Squires, sought to contradict the visual appearance of a separation in that photograph by arguing that the walkway was supported by pilings that were embedded in cribbing. Tr. 8/2/96 at 2079-81. The legend on the photograph however, shows that Island Number Three, which was built to house the infectious-diseases hospital, was intended to be separate. Tr. 8/8/96 at 3522-58. I believe the photograph shows that Island Number Two was surrounded by water at one time. *See* Tr. 7/26/96 at 2233 ("[SPECIAL MASTER VERKUIL]: I can't help but observe that in a moment like this a picture is worth a thousand words"); *see also* Tr. 8/8/96 at 3526, 3528 (Mr. Unrau conceded that Island Number Two was once surrounded by water, although he also believed it was connected by fill to Island Number One).

Under the Compact, Islands Two and Three, which were once separate islands, are in New Jersey's sovereign territory. Under the accretion and avulsion doctrine, those landfilled areas are in New Jersey, as is the landfill added to Island Number One. The fact that there was a synaptic moment in time when three islands existed is legally

significant only if I conclude that the Compact defined "one" Ellis Island. Because, in my view, the issue of jurisdiction over the landfilled portions of the Island was not settled by the Compact, the question of the size of the original Island after filling is not dispositive. Under the applicable common-law doctrine of accretion and avulsion, New Jersey is entitled to prevail whether or not Ellis Island was originally one, two, or three islands.

c. Wharfing-Out

Nor is the Ellis Island issue one of wharfing-out. New Jersey concedes that the owner of Ellis Island would have the right to "wharf-out" under applicable law. N.J. Post-Trial Br. at 9. Some minor wharfing-out did occur on the Ellis Island dock pre-1834, but the main additions that occurred after 1890 were far too extensive to be considered wharfing-out. The fast land of the Island grew over nine hundred percent.⁴⁰

2. *The Common Law Of Accretion And Avulsion*

There is no dispute in this case that the substantial additions to the Island after 1890 were artificially added by fill. See Stipulated Facts ¶ 13 (July 10, 1996) (DI 338a); see also App. F (Map of Ellis Island Historical Development 1920-1936; Map of Structural Development of Ellis Island, 1890-1935). There is also no dispute between the parties that the landfill is an avulsive (not an accretive) occurrence. The only question is whether this avulsive action served to expand the territory of the sovereign State of New York under the Compact or whether the landfill is in New Jersey's territory under the common law. The United States as owner purchased a

⁴⁰ Another dispute arises over whether New York as sovereign over the 1833 Island is entitled to claim only to the high-water mark, or also to the low-water mark. I address this question in the remedy section. See *infra* Part VII.B.1.

deed from New Jersey to cover the land added by fill; it therefore owns all of the Island (except for the 0.57 acres that New Jersey did not convey).

The Court traditionally has applied the common law of avulsion and accretion when analyzing the impact of changes to land on a boundary between states. "Accretion is the increase of riparian or littoral land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water." 78 Am. Jur. 2d *Waters* § 406 (1975); *Alexander Hamilton Life Ins. Co. of Am. v. Governor of the Virgin Islands*, 757 F.2d 534, 538 (3d Cir. 1985). Avulsion, by contrast, is "sudden and major shift of land," such as "human placement of artificial fill." *Id.* at 538.

Under federal common law, and the state law of both New Jersey and New York, the "ancient rule" is that acts of avulsion do not expand territorial lines. *See Arkansas v. Tennessee*, 310 U.S. 563, 566, 569-71 (1940); *Missouri v. Nebraska*, 196 U.S. 23, 35-36 (1904); *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 67 (1874) ("[I]f the alluvion [avulsion] be sudden or considerable, in this case it belongs to the king. . . ." (citing 2 William Blackstone, *Commentaries* * 262)); *Alexander Hamilton*, 757 F.2d at 538-39 (describing ancient rules of the common law concerning limits on upland owners' power to add to lands by artificial filling); *see also Borough of Wildwood Crest v. Masciarella*, 240 A.2d 665, 668-69 (N.J. 1968); *In re Town of Hempstead*, 144 N.Y.S.2d 440 (Sup. Ct. 1954), *aff'd*, 156 N.Y.S.2d 219 (App. Div. 1956). This is also a long-standing principle of international law, which has been accepted by this Court to resolve interstate boundary disputes. *See Nebraska v. Iowa*, 143 U.S. 359, 368 (1892); 2 *Digest of Int'l Law* at 1084-85 (Marjorie Whitman ed., 1963); John M. Rogers, *Applying the International Law of Sovereign Im-*

munity to the States of the Union, 1981 Duke L.J. 449, 467 (1981); Christopher C. Joyner, *Ice-Covered Regional International Law*, 31 Nat. Res. J. 213, 229 (1991). This is a rule of fairness as well as common sense; otherwise, sovereigns could intentionally and willfully change their boundaries to the disadvantage of other sovereigns.

In *Georgia v. South Carolina*, 497 U.S. 380 (1990), this Court emphasized the general proposition that avulsion works no change in a boundary and that "one cannot extend one's own property into the water by landfilling or purposefully causing accretion." *Id.* at 404.

Under the test in *Georgia v. South Carolina*, the additions to Ellis Island by landfilling post-1890 are "avulsive action[s]." *Id.* Neither the United States nor New York can expand ownership or territorial claims to Ellis Island merely by adding to land under water. Thus, while nearly all of the landfilled portion of Ellis Island is *owned* by the United States pursuant to deed, it is still within the sovereign territory of New Jersey as determined by the 1833 boundary set out in the Compact.

C. Summary

In summary, I recommend that this Court reach the following conclusions: (1) The interstate boundary between the States is set forth in Article First of the Compact of 1834; (2) The Compact accords New York sovereignty over Ellis Island as it existed in 1833 to the low-water mark thereof, *see infra* Part VII.B.1; (3) All land added by fill beyond the limits in (2) that is owned by the United States is land over which New Jersey remains sovereign under common-law doctrine; and (4) The 0.57 acres of Ellis Island that was not deeded to the United States is both owned by New Jersey and within her sovereign territory.

VI. PRESCRIPTION AND ACQUIESCENCE

New York raised the affirmative defense of prescription and acquiescence in her answer, and much of her evidence during trial was introduced to prove that she has satisfied the elements of this common-law doctrine. In that event, although the Compact of 1834 established New Jersey's sovereignty over the landfilled portion of Ellis Island, New York's claims to sovereignty would still be superior because of New Jersey's acquiescence.

A. Description Of The Doctrine

The equitable doctrine of prescription and acquiescence has long been applied to original jurisdiction cases. A state may acquire sovereignty over the territory of another through a regime of such continuous and undisputed exercise of jurisdiction (possession and prescriptive acts) that her domain becomes the new accepted order. The other sovereign acquiesces by failing to enforce rights of dominion against a recognizable challenge. *See generally Georgia v. South Carolina*, 497 U.S. 376, 389 (1990); *Arkansas v. Tennessee*, 310 U.S. 563 (1940). In essence, the doctrine of prescription and acquiescence is "the uninterrupted exercise of dominion by a State for a sufficient length of time over territory belonging to another and openly adverse to the claim of that other, suffic[ient] in itself to transfer the right of sovereignty over the area concerned." Charles Cheney Hyde, 1 *International Law* § 116, at 386 (1945). Unlike laches, which is a product of the common law, the doctrine of prescription and acquiescence derives from international law and suits between sovereigns, thereby gaining relevance and legitimacy when sovereign states sue each other in original cases.

The standard for non-acquiescence has been the subject of debate in this case. New York has argued that the only way New Jersey could show non-acquiescence was by filing a lawsuit against New York, which she failed to do for

"more than 100 years." Hr'g Tr. at 39 (Ms. Kramer for New York). And, declared New York, "[t]here is not a single case that suggests in any way that anything less than filing suit can establish nonacquiescence. It is New York's position that that is the law." *Id.* at 40; *see also* N.Y. Reply at 16 (Apr. 1, 1996) (DI 259). After trial, although she reiterated that proposition, New York did not maintain that this strict standard was the only one for proving non-acquiescence. She explained her view: "Under prevailing case law, New Jersey had to object to New York's exercise of sovereignty or prescription over Ellis Island and its adjacent lands at or near the time New York exercised its sovereignty or prescription, not, as it did, 103 years later." N.Y. Post-Trial Mem. at 26 (Oct. 3, 1996) (DI 365).

This Court has not required the filing of a lawsuit as a precondition to avoiding a shift in sovereignty via prescription and acquiescence. Rather, the test for non-acquiescence is a multi-faceted one that permits an expression of sovereignty to be shown in any "practical way," including litigation. *See, e.g., Michigan v. Wisconsin*, 270 U.S. 295, 316-19 (1926) (analyzing state's assertion of ownership over the land in question); *Indiana v. Kentucky*, 136 U.S. 479, 509-12 (1890) (analyzing whether state continuously asserted title to land in question); *Rhode Island v. Massachusetts*, 40 U.S. (15 Pet.) 233, 271 (1841) (undertaking prescription and acquiescence analysis and noting that, although Rhode Island had never prosecuted her claim of right, she "has from time to time made efforts to regain her territory by negotiations with Massachusetts"). A state may interrupt the continuity of the other state's adverse claim by "protest, in the international context, short of 'use of force.'" Hyde, *supra* § 116, at 387.

As this Court has stated on numerous occasions, most recently in *Georgia v. South Carolina*, "long acquiescence

in the practical location of an interstate boundary, and possession in accordance therewith, often has been used as an aid in resolving disputes." 497 U.S. at 389. The Court added that "[p]ossession and dominion are essential elements of a claim of sovereignty by prescription and acquiescence" and that "[i]naction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a response." *Id.* The Court noted later that "inaction alone may constitute acquiescence when it continues for a sufficiently long period." *Id.* at 393. *Cf. New Jersey v. Delaware*, 291 U.S. 361, 376-77 (1934) (noting that "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them" and concluding that "[a]cquiescence is not compatible with a century of conflict").

The *Georgia v. South Carolina* Court was interpreting a boundary between states defined in a "Convention known as the Treaty of Beaufort of April 28, 1787." 497 U.S. at 380. The treaty, having been ratified by the legislatures of each state and by the Continental Congress, *id.* at 381, was comparable to an interstate compact. As with this case, the dispute between Georgia and South Carolina had been the subject of related litigation in prior years.⁴¹ The Court held that South Carolina had acquired certain islands (the Barnwell islands) via prescription and acquiescence even though the islands had been granted to Georgia in the Treaty of 1787. The prescriptive acts included South Carolina's exercise of "dominion or control," *id.* at 391, through "almost-uniform taxation of the property," *id.* at 392, her seizure and subsequent sale of the

⁴¹ The first case before the Court arose in 1876 and the second in 1922. See *South Carolina v. Georgia*, 93 U.S. (3 Otto.) 4 (1876); *Georgia v. South Carolina*, 257 U.S. 516 (1922). Thus, if *New Jersey v. New York* in its antecedents is the "oldest" original case, *Georgia v. South Carolina* should be awarded second place.

property for non-payment of taxes, policing and prosecutorial activities and other factors. Georgia defended by asserting that inaction alone, without reasonable notice, cannot constitute acquiescence. The Court found, however, that there were numerous acts that put Georgia on notice, such as cultivation by South Carolina residents, a failure to assert taxing authority, and Georgia deeds describing the islands as within South Carolina. In light of this evidence, the Court concluded that under "ancient principles of adverse possession" the islands belonged to South Carolina.

As discussed below, New York's acts of prescription on the filled portions of Ellis Island do not meet the standards set forth by the Court in *Georgia v. South Carolina* and related jurisprudence.

B. The Related Doctrine Of Laches

Laches, a related equitable doctrine that requires proof of (1) lack of diligence and (2) prejudice, has been held inapplicable to suits between sovereigns involving interstate boundary disputes. In *Illinois v. Kentucky*, 500 U.S. 380 (1991), the Court held that "[a]lthough the law governing interstate boundary disputes takes account of the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitations, it does so through the doctrine of prescription and acquiescence." *Id.* at 388 (citing *Georgia v. South Carolina*, 497 U.S. 376).

Recently, however, the Court noted that "[t]his Court has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact." *Kansas v. Colorado*, 115 S. Ct. 1733, 1742 (1995). The Court did not resolve the question because it concluded that an essential element of the doctrine, lack of diligence, had not been proved. *Id.* at 1743.

I have therefore assumed that, as New York urges, the laches doctrine could apply to this case, which is essentially a compact interpretation case, and have preserved the record in the event this Court should chose to readdress the question left open in *Kansas v. Colorado*. See also *supra* Part I.C.3. The parties during trial submitted or countered evidence relevant to the doctrine of laches and debated its applicability. Ultimately, there are no issues raised by the laches doctrine that cannot be subsumed under the more established doctrine of prescription and acquiescence. This is especially true of the overriding equitable principle at play in both defenses, namely acquiescence or lack of diligence. See Interim Op. at 51 (May 9, 1995) (DI 286).

The issue of prejudice, which New York averred to in her offer of proof, is based on her claim that documents may have been destroyed prior to the time suit was commenced.⁴² Because it is impossible to know from the

⁴² New York's expert, Mr. Unrau, testified, for example, that documents may have been lost or neglected after 1954, once the federal immigration station was closed:

[MR. UNRAU: Historical records] were on the Island at the time the Island closed, and . . . they were taken [to Federal Hall at some point] because Ellis Island was basically just falling apart after it closed [in 1954]

. . . .

[MS. KRAMER for New York]: So between 1954 and 1965, the boxes were sitting there unattended?

[MR. UNRAU]: I would say they probably were

. . . .

[MS. KRAMER]: As you sit here today, is there any way for you to know whether or not any of the documents that were left on Ellis Island unattended for nine years comprised the entire record as we would like to figure it out today?

[MR. UNRAU]: I wouldn't say they would comprise the total record, no.

Tr. 7/25/96 at 1957-58.

[Continued]

record whether that speculation is correct, I cannot find prejudice on the facts before me. Moreover, I am satisfied that New York's concerns can be addressed through an analysis of prescription and acquiescence. Therefore, application of the laches doctrine is not necessary to a just resolution of this case. This is especially so in light of this Court's traditional reluctance to apply the laches doctrine against states, because states as sovereigns have been free to act since time immemorial under English common law without traditional bars such as the statute of limitations or laches. See *Block v. North Dakota*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting); *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824). Thus, having raised the issue of laches sua sponte, I put it to rest on the same basis. Nevertheless, the Court has the record before it to address laches should it decide to do so.

C. Distinct Prescriptive Periods

Because the federal government did not begin significant filling of Ellis Island until 1890, the years prior to that time cannot give rise to claims of prescription over the landfilled area. Moreover, from 1955, when Ellis Island ceased to be used as an immigration or detention

⁴² [Continued]

Mr. Unrau also testified that pilferage and theft occurred on the Island between 1954-65:

There . . . are numerous references in newspapers and so on that people would sneak out to Ellis Island during the night and help themselves to plumbing, dishes. I'm told that some people have whole sets of dishes from Ellis Island in their private collection. . . . Ellis Island was subject to all kinds of depredations after '54.

Id. at 1958-59; see also Tr. 7/30/96 at 2477-78; N.Y. Post-Trial Mem. at 44 ("At this juncture, one can only assume that at least some of the documents lost or destroyed would have supported New York's claim even further.").

center, both States were much involved with the federal government in the Island's proposed redesignation and reuse. Therefore, prescriptive acts are much more difficult to show after that time.

Thus, to analyze whether New York has acquired sovereignty over the landfilled portions of Ellis Island through prescription and acquiescence, I recommend that this Court examine four periods from the Compact of 1834 to the present:

Prescriptive Period	Significance
1834-1890	No landfill over which New York could exercise prescription.
1890-1934	United States hegemony over the island under its immigration program. A critical period for prescription and acquiescence.
1934-1955	A second critical period of United States's control (post-immigration) for analyzing prescription and acquiescence.
1955-present	New Jersey much too active in opposition to New York's jurisdiction for New York to carry her burden on acquiescence.

In my view, the crucial time periods for evaluating prescriptive acts are the two eras from 1890 and 1955. New York's sovereign assertions and New Jersey's actions of non-acquiescence during those two periods will be the focus of the analysis.

D. Discussion

New York offered into evidence documents, expert reports, and testimony of three historians to support her affirmative defense. The documents included twenty-two

death certificates (twenty-one of which were dated 1924); twenty-two birth certificates; five marriage certificates; New York City voting records; census documents; and various other materials documenting public perception or belief concerning the sovereign attributes of the Island. She also produced maps and charts designating Ellis Island as in New York or New York Harbor. The documents were introduced into evidence through her historical witnesses (Drs. Hershkowitz and Kraut and Mr. Unrau) and are discussed below.

New Jersey counters by listing her own acts of non-acquiescence and challenging New York's acts of prescription. The most significant of New Jersey's acts are addressed below. Moreover, New Jersey discounts New York's ability to exercise prescriptive acts over the Island because of New York's sale and cession of jurisdiction to the United States and points out in detail why New York's prescriptive acts are insufficient to establish the defense. N.J. Post-Trial Br. at 16-21, 31-41; NJPFF ¶¶ 64-94 (Oct. 12, 1996) (DI 366). After trial, New Jersey summed up her position as follows:

Ellis Island was, and is, a federal enclave. And in the circumstances, there was little, if any, opportunity for New York to exercise the sort of governmental authority that would allow it any basis upon which to assert a claim of prescription.

....

New York could not and did not build public roads on the Island. New York could not and did not build public schools or other public buildings on the Island. Its police did not patrol the Island. And New York has admitted that it had no evidence of any civil or criminal complaint filed by New York authorities for alleged unlawful acts on Ellis Island. New York's Fire Department did not routinely provide fire pro-

tection services on the Island. New York did not sweep the streets or collect the garbage.

Tr. 8/15/96 at 4032-33 (Mr. Yannotti for New Jersey).

1. *The Notice Requirement And The Burden Of Proof*

In her articulation of her affirmative defense, New York has misinterpreted or overlooked an important distinction of the notice requirement attendant to the doctrine of prescription and acquiescence. It is New York's burden to establish her prescription over the filled portions of the Island and New Jersey must have notice of these acts under the *Georgia v. South Carolina* rationale discussed above. *See supra* Parts V.B. and VI.A. Both in her briefing and in particular during trial, however, New York consistently questioned whether New Jersey gave formal, direct notice of *her* acts of non-acquiescence to New York. *See, e.g.*, Tr. 7/17/96 at 955, 970-72; Tr. 7/18/96 at 1043, 1046, 1057, 1076-79, 1098, 1108-09, 1120; Tr. 7/19/96 at 1189, 1262-63, 1291-92. New York maintains that "New Jersey never notified New York in any letter, document or communication whatsoever that it was asserting sovereignty over the filled portions of Ellis Island." N.Y. Post-Trial Mem. at 27; *see also* NYPFF ¶¶ 516-730 (Oct. 3, 1996) (DI 365) and transcript references therein.

This stance suffers from at least two related problems. First, it constitutes a misinterpretation of the doctrine of prescription and acquiescence. That doctrine, analogous to adverse possession, *Georgia v. South Carolina*, 497 U.S. at 393, provides that in order to meet its burden, the state proving prescription must prove "notice" to the other state. *Id.* (quoting *Landes v. Brant*, 51 U.S. (10 How.) 348, 375 (1850)). But New Jersey is not attempting to establish her prescription over the filled portions of the Island; she is seeking to prove non-

acquiescence. Second, New York's theory that New Jersey needed to provide direct notice to New York attempts to shift to New Jersey New York's clear burden of proving prescription. Thus, to hold New Jersey to a burden of providing direct "notice" to New York of her claims to the landfilled portions of the Island would both inappropriately shift the burden to New Jersey and misinterpret the relevant jurisprudence.

2. *Important Considerations*

At the outset, this analysis is influenced by several considerations. The alleged prescriptive acts are (1) subject to the possession and control of the Island by the United States during the entire period; and (2) limited to the filled portions of Ellis Island because New Jersey has not challenged New York's sovereignty over the "original" Island.

a. *Possession And Control By The United States*

New Jersey argues that New York's two-time cession to the federal government "vest the federal government with exclusive authority over the ceded area and result[] in a complete dilution of State control." N.J. Post-Trial Br. at 29-30. Thus, avers New Jersey, citing various precedents, New York cannot establish "possession and control." *Id.* at 30.

New York counters that she ceded only "partial jurisdiction" to the federal government in 1808 "for the limited purpose of safety and defense," and did so involuntarily. N.Y. Post-Trial Mem. at 18. Therefore, New York claims, she has been able to establish her sovereignty over the filled portion of the Island by prescription. Despite the federal government's continued possession of and jurisdiction over the Island, New York prescribed "the voting, tax, education, health (including maintenance of vital statistics), labor, environmental and marriage laws on Ellis Island, including the landfill." *Id.*

at 21. New York also points to "the indelible public perception" that she was sovereign over the Island. *Id.*

As this Court ruled in *Georgia v. South Carolina*: "Possession and dominion are essential elements of a claim of sovereignty by prescription and acquiescence." 497 U.S. at 389. Both New Jersey and New York have been able to exercise only limited dominion over Ellis Island because the Island and its filled portions have been in the possession of the United States government by deeds obtained from both States. Indeed, the United States suggested to this Court in 1994 that its own jurisdiction over Ellis Island from 1800 to the present, based on cessions by both sovereigns, left "very little, if any, practical conflict between New York and New Jersey arising from activities on the Island." U.S. Br. at 9 (Apr. 28, 1994) (DI 6).

The kind of open and notorious adverse possession acknowledged in *Georgia v. South Carolina* cannot readily be found under these circumstances, because the usual indicia of state control such as taxation and exercises of police power are more difficult to demonstrate when the United States rather than a private party is owner and operator of the Island. On the other hand, the cases do not demand that a state maintain actual ownership to establish possession and control. Thus, while it may be harder to demonstrate sovereign control without possession, a state must still be able to demonstrate prescriptive acts even when the United States is owner of the property in question. See, e.g., *Arkansas v. Tennessee*, 310 U.S. at 568-71; *New Jersey v. Delaware*, 291 U.S. at 377 (Delaware obtained jurisdiction by prescription over an island ceded by New Jersey to the United States "for the erection of a fort"); *Kleppe v. New Mexico*, 426 U.S. 529, 544 (1976) (mere "federal ownership of lands within a State does not withdraw those lands from the jurisdiction of the State"). Federal ownership, while not fatal to the analysis, is thus a relevant and complicating factor in

interpreting the quality of New York's prescriptive acts and New Jersey's countervailing acts of non-acquiescence.

b. Distinguishing Prescription Over The Original Island From The Filled Portion

New York has been challenged to prove that her several prescriptive acts over the Island extend to the filled portion. It is assumed that New York is involved in the administration of the Island because she has long been sovereign over the original Island—indeed, even before the Compact years. New Jersey continually pointed to this complicating factor during trial:

[MR. MARSHALL:] While Dr. Kraut's conclusions are based upon scant documentary evidence and are speculative at best, it is undisputed that a portion of Ellis Island is within New York's jurisdiction and evidence of such designations on landing cards, certificates of arrival, and steamship tickets is irrelevant or, alternatively, should be precluded since such evidence tends to confuse the pertinent issues and is a waste of time.

Similarly, with respect to certificates of marriage, New York, produces less than a dozen certificates of marriage and admits . . . that it is without sufficient information to admit or deny whether any of the certificates . . . [evidenced] a marriage ceremony actually held on Ellis Island.

. . . .

. . . [and if they were, it would have been] on the original Ellis Island in the Great Hall.

Tr. 7/29/96 at 2289 (Mr. Marshall for New Jersey). This excerpt emphasizes the difficulty of proving prescription on the landfilled portion of the Island in the context of divided sovereignty with a third sovereign in control.

3. New York's Acts Of Prescription

At trial, New York introduced proof of several prescriptive acts. Her list begins long before the relevant

time periods. In 1730 Governor John Montgomerie granted a charter to New York City that included within New York's political jurisdiction Bucking Island, which became Ellis Island. See N.Y. Mem. for Summ. J. at 4 (Mar. 5, 1996) (DI 235) (citing Jerold Seymann, *Colonial Charters, Patents and Grants to the Communities Comprising the City of New York* 281 (1939)). This is an unambiguous act of political control and New York refers to it repeatedly. Of course, this 1730 exercise of political jurisdiction over the Island hardly decides this case. New York's jurisdiction over Ellis Island was recognized in the 1834 Compact and, without more, it does not resolve the filled portion issue.⁴³

New York has introduced evidence of a series of activities after 1834, including maps that place Ellis Island in a New York City voting district and the use of New York City marriage laws and death certificates. In addition, New York points to her provision of police and fire protection to the Island, including the filled portion.

Prior to any of these activities, New York undertook an apparent act of sovereignty. In 1880 the United States obtained a deed from New York for certain underwater lands around Ellis Island. See Tr. 7/17/96 at 886, 925-27, 953-54; Tr. 8/15/96 at 4014, 4039, 4159. This deed, however, is not particularly probative of New York's assertion of sovereignty over these lands. Under either State's interpretation of the Compact of 1834, New Jersey possessed property rights in these lands;

⁴³ New York asserts that her political jurisdiction over the Island did not change when it was expanded by fill to 27.5 acres and the only evidence that New Jersey included it within her own political limits was that Hudson County carried the filled portion on her tax rolls. New Jersey also has sought to demonstrate that the political maps of New York City did not change the shape of the Island after it was filled. See New York State Assembly District Maps (1918, 1926, 1927, 1929, 1930, 1939, 1945, 1946, 1953) (DE 957-65). I have examined those maps, which are in evidence, and they do appear to depict the original almond-shaped Island.

thus, only she could sell or deed the lands to the United States. See Tr. 7/17/96 at 925-26. In this respect neither the States nor their experts were able to explain on what basis New York granted this deed to the United States, and New York made little of this deed during trial. As explained in more detail below, moreover, in 1904 the United States obtained from New Jersey a grant that contained these same lands, acknowledging that the 1880 deed was incorrect or insufficient, or both. See Tr. 7/17/96 at 886, 953-54; Tr. 8/15/96 at 4039-40. For these reasons, this peculiar act of New York is worthy of little weight.

The testimony of Dr. Kraut, one of New York's expert witnesses, further details New York's acts of prescription in this period. I describe here the most important of those acts, which New Jersey does not contest. As described further below, however, most of these acts either simply describe the general association between New York City and immigration through Ellis Island, without describing specific acts of prescription, or else fail to detail activity on the filled portion of the Island.

Between 1890 and 1900, for example, the "Barge office" in New York City was the interim federal immigration depot during the reconstruction of Ellis Island after the great fire of June 14, 1897, which burned to the ground the wooden structures on the Island. Dr. Alan M. Kraut Expert Report at 7 (undated) (DE 933). In 1915 the Immigration Commissioner in the Port of New York, Frederick Howe, invited New York City officials to utilize several reception buildings on Ellis Island to house an overflow of homeless and unemployed people, chiefly immigrants. *Id.* at 21.

When the federal government undertook construction on the landfilled portions of the Island, it was undertaken "in cooperation with New York and in compliance with the laws and standards of New York City or State." *Id.*

at 8. In computing probable contract costs in the early 1900s, New York rates were the standard against which federal costs were estimated. *Id.* at 10-11. In 1909 and 1910, federal officials sought to set the wages of the workers on the construction projects to conform to hourly wages paid construction workers in New York City. *Id.* at 10-12. Similarly, in 1932, federal specification for contracts on the installation of equipment for Island Number Three stipulated that the prevailing rate of wages for New York City "shall be enforced" on all contractors and sub-contracts. *Id.* at 12-13.

The few birth certificates available describe the place of birth of babies born on the Island as New York City; these certificates were issued by the New York City Department of Health. *Id.* at 16-17. With regard to marriages, in November 1907 the New York State Legislature enacted a bill that required all persons wishing to get married as of January 1, 1908 to first obtain a marriage license from the city or town of their residence; all those on Ellis Island were required to get their marriage licenses at City Hall, New York. *Id.* at 17. In 1908, of the 267 individuals who died on Ellis Island, 201 were buried by a Manhattan contractor; he conducted most of the burials in Brooklyn, New York. *Id.* at 18.

Ellis Island has apparently always been included in the jurisdiction of the New York City Metropolitan Police Department and is included as part of New York County. *Id.* at 19. There are at least two examples of New York City's acting on its police jurisdiction over Ellis Island in cases of crime on the Island. *Id.* This evidence is offset by some involvement by New Jersey in policing the Island as well. Mr. Unrau, New York's witness, admitted this on cross-examination. Tr. 8/8/96 at 3636-37.

The evidence of many of these acts is inconclusive with respect to the landfilled portion of the Island. The death certificates are almost all from one year. There is no con-

clusive evidence that the marriages represented by the marriage certificates took place on the Island. Indeed, New York was unable to prove that the births, marriages, and deaths she documented occurred on the Island, let alone the landfilled portion. New York's witness, Mr. Unrau, confirmed that, in Fiorello La Guardia's memoirs, La Guardia describes having travelled to Manhattan with couples so they could get married, but does not include recollections of marriages having occurred on the Island. Tr. 8/8/96 at 3615-18. With respect to New York taxes allegedly paid by Island residents after 1984, the evidence was unconvincing; it consisted largely of testimony by a NPS witness that he handed out New York City non-resident tax forms to federal employees. There was no direct evidence of taxes paid by these employees.⁴⁴

Finally, New York introduced a series of maps, post cards, letterheads, and other documentation that use the description "Ellis Island, New York" or similar designation during the post-1890 period. Indeed, New York's expert witnesses, historians Drs. Hershkowitz and Kraut, testified that in their opinion it was the public perception that even the post-fill Island was in New York, not New Jersey. *See, e.g.*, Tr. 7/24/96 at 1751-59. Such documentary evidence is relevant, New York argues, to a public perception of her sovereignty over Ellis Island. New York uses public perception both to establish prescriptive claims and to prove notice to New Jersey of New York's claims to Ellis Island.

⁴⁴ New York even produced a fact witness who testified that he lived on the Island for a year and a half from mid-1940 until late 1941 while his father was stationed on Ellis Island as a physician for the United States public-health service. Mr. William J. Hewitt testified that, "from family stories and photographs," Tr. 8/5/96 at 3137, he remembered that, as a *one-year old*, he had lived in New York when his family was on Ellis Island, a location he later described in his 1965 application to the New York Bar as "USPHS Hospital, Ellis Island, New York, (Manhattan)." *Id.* at 3141.

Public perception is a relevant consideration but hardly dispositive. See *Virginia v. Tennessee*, 148 U.S. 503, 527 (1893) (noting that although certain residents living near the boundary line set out in a compact between the states regarded an area of land as Virginia, contrary to the provisions of the agreement, "[t]hat fact . . . cannot affect the potency and conclusiveness of the compact between the States by which the line was established in 1803"); see also *Louisiana v. Mississippi*, 202 U.S. 1, 55 (1906).

New Jersey counters New York's prescriptive evidence on two grounds. First, she asserts that virtually everything New York submitted to demonstrate public perception fails to distinguish between the original and filled portions of Ellis Island. Second, she contests the weight and factual accuracy of New York's evidence. I agree with New Jersey on both bases.

For example, testimony at trial was directed at the significance of the Immigration and Naturalization Service's ("INS") designation of the Post Office on the Island as "Ellis Island, New York." New Jersey introduced evidence that the Post Office itself was in the Main Building located substantially on the original Island, and therefore that the designation was consistent with her view of New York's sovereign territorial limits. The historian for the INS, Ms. Marian L. Smith, testified to that effect:

[MR. MARSHALL for New Jersey:] . . . Ms. Smith, in your investigation in this matter do you have an opinion as to where that post office, if there was a post office, was located on Ellis Island?

. . . .

[MS. SMITH:] It's my opinion that the evidence that we do have shows that there was a post office and that it was on the original portion of the Island.

Tr. 8/9/96 at 3944; *see also* Tr. 7/22/96 at 1494 (Ms. Smith testified that the Post Office was in the Main Building on the original three-acre island). While New York contested this locational evidence, I found Ms. Smith's sources reasonable and her opinion convincing. Because of the conflicting testimony and the lack of conclusive evidence, however, I am unable to determine exactly where the Post Office was located. Because New York bears the burden of proving prescription, I conclude that the Post Office could have been on the original part of the Island—whose sovereignty is not contested by New Jersey.

Moreover, testimony on behalf of New Jersey by Ms. Smith suggested that INS Post Office designations at that time did not follow state lines or declare boundaries, but rather designated geographical areas. Smith Summ. J. Aff. ¶¶ 129-34 (Mar. 26, 1996) (PE 490). She even pointed out that these designations once included part of New Jersey within the New York area: "During the earlier decades, the whole of New Jersey was in the New York District. In later decades, northern New Jersey was in the New York District." *Id.* ¶ 131. Ms. Smith also showed that while the United States might have New York State building codes in its construction projects, it was not bound to do so. *Id.* ¶¶ 119, 121-22.

New Jersey was also able to show, through the same witness, that the connection between immigrant arrivals on Ellis Island and their transfer to New York City was not an exclusive one. This was confirmed on cross-examination of Mr. Unrau, expert witness for New York. Tr. 8/8/96 at 3629-30. In that regard, Ms. Smith testified, and I find as a fact that, in addition to the well-known ferry from Ellis Island to the Battery in New York City, a ferry from the Island to Jersey City also was available to take immigrants to the New Jersey railroad terminals:

[MS. SMITH]: Well, ferries ran to the New York shore, so people going to New York or points north-east . . . would take the ferry. Other transport took them to the railroad terminals on the New Jersey side to take them west.

[MR. MARSHALL for New Jersey]: And do you have any idea of the percentage breakdown of percentage of immigrants that travelled to New York versus the New Jersey railroad areas?

[MS. SMITH]: I have heard different claims. I think I have heard that 60 percent went to New York. I have also read that two-thirds went through the New Jersey terminals.

Tr. 7/22/96 at 1349; *see also* Tr. 8/9/96 at 3916-17, 3976-80. Dr. Kraut, New York's expert, testified that he was not aware of a ferry service between New Jersey and the Island prior to 1990. Tr. 7/29/96 at 2406-07. But the weight of the evidence suggests that, Dr. Kraut's view notwithstanding, such a service did exist.

As New Jersey points out, New York's evidence is scant. New York has been able to establish only isolated or episodic prescriptive actions—and without certainty that these acts occurred on the landfill. The evidence taken as a whole does not prove prescription over the landfill. New York rebuts by arguing that New Jersey has not asserted her sovereignty over the landfill area. But New Jersey, as sovereign, legally does not need to exercise prescriptive acts over her own territory. Rather, she has to counter New York's prescriptive acts of which she has notice by not acquiescing in those acts. New Jersey's acts of counter-prescription are thus best viewed as evidence of non-acquiescence.

4. *Important Maps Of Ellis Island*

Between New York's acts of prescription and New Jersey's acts of non-acquiescence is the presumptively neu-

tral ground of the mapmaker. The Court's jurisprudence illustrates that maps produced during the period of a state's putative dominion and possession are a relevant measure of the extent of that state's prescription. That is, maps published during the relevant periods of prescription that describe the territory at issue as part of the state claiming sovereignty can be probative of the extent of the state's prescription. See *Michigan v. Wisconsin*, 270 U.S. at 316-19 (evaluating Wisconsin's successful prescription over a group of islands in Green Bay by noting that the United States Land Department had "uniformly and notoriously recognized the islands" as a part of Wisconsin); *Louisiana v. Mississippi*, 202 U.S. at 55-57 (noting the United States Commission of Fish and Fisheries, as well as the General Land Office of the United States, had created maps that described the land at issue as part of Louisiana). These maps are thus probative evidence in the analysis of prescription and acquiescence, independent of acts undertaken by the States.

Eight maps from the 1890s and early twentieth century, during the central prescriptive period, that are prominently entitled "Ellis' Island, New Jersey," are the first set of key documents in this regard. See App. G (reproducing one such map). These maps were prepared for the Chief of Engineers of the United States Army by the Federal Harbor Line Board and they provided important information about New York Harbor which was intended to be relied upon for navigational and defense purposes. See, e.g., Tr. 7/18/96 at 1039-40, 1044-52; Tr. 7/30/96 at 2537-43. The significance of these maps is that they were approved by the Secretary of War, Elihu Root, and produced over his signature.⁴⁵ These Harbor Line maps

⁴⁵ From my observation of the evidence at trial, the Secretary of War actually signed these maps. Tr. 7/30/96 at 2537-38. The plates that produced these Harbor Line Board maps were the subject of much discussion at trial by one of New York's expert

are especially probative of the federal view about sovereignty over Ellis Island. They gain credibility because Mr. Root, President McKinley's Secretary of War, was a distinguished lawyer who was active in New York City politics; he later became a United States Senator from New York.⁴⁶ Although one can only speculate about his awareness of the Ellis Island controversy, his signature on a map near the designation "Ellis' Island, New Jersey" makes this weighty evidence.

The other Harbor Line maps published after 1890 are relevant in examining the extent of New York's prescription during the period of filling around Ellis Island. Even assuming that New York is correct in her allegation that subsequent maps were printed through the routine utilization of the same copper plate on which the 1890 map was engraved, *see supra* note 45, these later maps reflected changes occurring on the Island. The fact that the changing shape and size of the Island were recorded while the title remained constant suggests that New York's

witnesses, Dr. Alan M. Kraut. He attempted to explain away the "Ellis' Island, New Jersey" designation as a "mistake" or an "error." Tr. 7/30/96 at 2523-32. While he could not explain how or why this "error" occurred, he sought the advice of another of New York's experts to help him do so. I am unpersuaded by their efforts to undermine the credibility of the maps' title. In 1890 the map did not yet reflect the substantial fill upon which New Jersey bases her claims, but it did set out pierhead and bulkhead lines that would support the forthcoming fill. *See* Tr. 7/30/96 at 2542-43 (Mr. Yannotti for New Jersey) ("[T]he enlargement was going to extend into the New Jersey land and this was on the New Jersey side of the boundary."). Because the title on the map was reproduced subsequent to 1890, I find it probative evidence supporting the United States's acceptance of New Jersey's legal position.

⁴⁶ *See* Phillip Jessup, *Elihu Root* (1938). Mr. Root served as an attorney for New York City on numerous occasions. *Id.*, Vol. 2, at 183-84; *see also* Richard Leopold, *Elihu Root and the Conservative Tradition* (1954) (documenting Mr. Root's extensive public and private career).

alleged acts of dominion and possession, in this instance over the landfilled portions of the Island, were not so conspicuous or continuous as to change the view of the Army concerning which State was sovereign.

The description of these later Harbor Line maps also undercuts the significance of New York's 1880 cession of land to the United States. Little more than a decade after having bought the land from New York as the putative sovereign, the United States—albeit via a different arm—described the Island and its landfill as part of New Jersey. At the very least, these maps establish that during this period the United States, in the neutral role of map-maker, did not assume that the landfilled Island was part of New York. This alone distinguishes the extent of New York's prescription from the cases considering maps produced by the United States. *Cf. Michigan v. Wisconsin*, 270 U.S. at 316-19; *Louisiana v. Mississippi*, 202 U.S. at 55-57.

Similarly probative with regard to the boundary lines between the States is the map prepared by Commissioners from both States in 1889. *See* PE 383(n) (App. D). This map should be accorded the same probative weight as the maps prepared by the United States depicting Ellis Island, as the presence of officials from both States protects against bias. The map depicts the boundary line between the States consistent with the boundary line of Article First of the Compact of 1834. Complementing the analysis of the extrinsic evidence of Compact meaning, this map thus describes a sovereign boundary under which the landfilled portions of Ellis Island lie on underwater lands over which New Jersey is sovereign.

These maps constitute the understanding of neutral parties with respect to the boundary line between the States, and thus undercut New York's assertion that she

exercised continuous and uninterrupted dominion and possession of the entire Island during this period. The same lack of consensus among similarly neutral parties characterizes descriptions of the Island during the period 1955 to 1993. *See infra* Part VI.D.5.b.(3).

Some of New York's evidence of prescription naturally shows the converse, that is, maps and other documents with the "Ellis Island, New York" or "Ellis Island, New York Harbor" designations. *See, e.g.*, Tr. 7/23/96 at 1701 (postcards designating Ellis Island in New York); *id.* at 1706-10 (maps designating Ellis Island in New York). One of these maps, prepared prior to any filling activity, was prepared by the United States Corps of Army Engineers. Prepared in 1889, this map depicted the basin or ship channel between "Jersey City and Ellis Island, New York." DE 932; *see also* NYPFF ¶¶ 287, 299, 300.

The point of this analysis, however, is not to determine what percentage of maps describe the territory as belonging in one State or the other. This is not a balancing exercise. The maps that New Jersey produces confirm the lack of consensus among federal and other mapmakers, which in itself undercuts New York's assertions of prescription during this period. As explained below, moreover, New Jersey undertook certain acts during these prescriptive periods that themselves undercut New York's acts of prescription.⁴⁷

⁴⁷ Moreover, since much of New York's case regarding prescription is directed to supporting the overall proposition that the public perception was that all of Ellis Island belonged to her, these maps by a responsible federal body would in likelihood have been seen, if not used, by New York officials, thereby undercutting the public-perception position. *See infra* Part VI.D.5.b.(1) (c).

5. *New Jersey's Acts Of Sovereignty And Non-Acquiescence*

a. *New Jersey's Sovereign Acts*

New Jersey introduced evidence of her own acts of prescription, the most important of which may well be the recorded deed of a transfer of her underwater territory to the United States in 1904 for purposes of the landfill. Another example of New Jersey's exercise of sovereignty over the landfilled portions—and thus evidence supporting non-acquiescence—is that Hudson County placed the filled portion of the Island on her tax rolls, albeit in a non-payment status due to its federal ownership. Hr'g Tr. at 58-59, 64-65.

New Jersey also demonstrated through New York's fact witness, Mr. John Compani, that although taxes on Ellis Island largely from activities related to tourism and construction were levied after 1955 by New York, utility taxes for water and gas were metered in and paid to New Jersey. Tr. 8/5/96 at 3283. Other instances include an application from the federal government for a New Jersey waterfront development permit for Ellis Island from 1933 to 1934; New Jersey Congresswoman Mary T. Norton's efforts to gain employment for New Jersey workers on Ellis Island projects in 1934; a federal government application to New Jersey for a permit to construct a water main for Ellis Island in 1937; and the application of New Jersey's wage rates by the Department of Labor on Ellis Island from 1947 to 1949. *See generally* NJPFF ¶¶ 95-191.

b. *New Jersey's Acts Of Nonacquiescence During Important Prescriptive Periods*

During the critical prescriptive periods from 1890 to 1955 (including the active immigration and expansion period from 1890 to 1934 and the more quiescent immi-

gration and detention center period of 1935 to 1955), New York undertook various acts of prescription, but failed to prove that she exercised dominion and possession over the landfilled area of the Island. Even had she done so, however, New Jersey's evidence of non-acquiescence throughout these years is conclusive. New Jersey maintained her dominion over the filled portion of the Island. She did not acquiesce in New York's sporadic assertions of prescription. New Jersey's claims and objections were current and active during both key periods.

(1) 1890-1934

(a) *1904 Recorded Deed Of Transfer
To The United States*

From 1890 on, New Jersey responded to the federal expansion of Ellis Island. The Court has noted in evaluating prescription and acquiescence that a state's acts of non-acquiescence for purposes of determining sovereignty include not only the "right of sovereignty," but the right of "ownership over its soil." *Indiana v. Kentucky*, 136 U.S. at 510; *see also Michigan v. Wisconsin*, 270 U.S. at 316-19 (analyzing extent of Wisconsin's prescription over islands in Green Bay by examining whether she continuously possessed and asserted title to the islands). Most important, soon after the expansion began, New Jersey requested of the United States that it recognize her claims by securing a deed to the lands under water that were being filled in. The deed itself was recorded in New Jersey. New York challenges the sovereign nature of this act of recordation based on her proposition that New Jersey had only property or riparian rights to the land underwater around the Island. But once I have concluded that under the Compact of 1834 New Jersey actually had sovereignty over these underwater lands on her side of the boundary, acts to protect property rights also become sovereign acts.

The United States's recognition of New Jersey's legal status was real and measured. The Attorney General of the United States, William Moody, wrote to the Riparian Commissioners on July 15, 1904, requesting New Jersey's grant of her ownership rights to underwater parts to the United States. The letter acknowledges New Jersey's claims under the Compact, as follows:

While there is no question as to the ownership and jurisdiction of New York of and over Ellis Island proper and its power to convey the same to the United States, it would seem from the boundary agreement between New York and New Jersey of September 16, 1833, that the ownership of the lands under water west of the middle of the Hudson River and of the Bay of New York is in the State of New Jersey.

Letter from William Moody, Attorney General of the United States 2 (July 15, 1904) (PE 338). Of course, Moody's letter also contends that the request is a matter of comity, because in his view Congress has an absolute right to regulate commerce or navigable waters and the Island expansion fell within that power. *Id.*

Nevertheless the Department of Justice's acceptance of New Jersey's claims to Ellis Island is relevant to rebutting New York's acquiescence argument. The July 15, 1904 letter also indicated Moody's awareness of the issues arising from the 1834 Compact, which is noteworthy in light of his later participation as an associate Justice of the Supreme Court in the *Central Railroad* case.⁴⁸ Justice Holmes wrote an opinion for a unanimous Court on which sat Justice Moody. Presumably, Holmes's opinion met

⁴⁸ Following his stint as Attorney General from 1902 to 1904, Moody was an associate justice of the Court from 1906 to 1910. *Congressional Quarterly's Guide to the U.S. Supreme Court* 837-38 (1979).

with Moody's informed approval; or at least it did not trigger his disapproval.

(b) *The Port Authority Amendment*

The legislative history of the Port Authority amendment, as well as the substance of the amendment itself, not only serves as extrinsic evidence of the drafters' intent, *see supra* Part IV.B.2.b.(3)(a), but also buttresses New Jersey's arguments against prescription and acquiescence. From 1917 to 1921, both States met over port matters. The Report documenting the history is voluminous, setting forth an exhaustive analysis of nearly every aspect of the Port of New York.⁴⁹ Indeed, the legislative documents and the amendment itself address seemingly every facet of the operations of the Port, including the operation of each State on her respective shores bordering New York Harbor. The legislative documents detail the contributions and shortcomings of each State to the present and future condition of New York Harbor.

Despite meticulous attention to detail,⁵⁰ the Report does not discuss Ellis Island, which by that time had grown

⁴⁹ The Report defines the Port as "that single community by Yonkers and New Rochelle on the north, Great Neck and Far Rockaway on the east, Perth Amboy and Sandy Hook on the south, Paterson, Newark and New Brunswick on the west." Report, *N.Y. Legis. Docs.*, 142d Sess., No. 103, at 8 (1919). The amendment also provided for a later renaming to the Port of New York and New Jersey, a title it assumed in 1972. *N.Y. Unconsol. Laws* § 6404 (McKinney 1979); *N.J. Stat. Ann.* § 32:1-4 (West 1990).

⁵⁰ The Report notes, for example, that the Commissioners considered twenty-three "special investigations," including the following, suggesting that the question of which state exercised jurisdiction over Ellis Island paled in comparison with the listed aspects of state control: West Side Railroad, Manhattan; Markets and Food Distribution; Exterior Belt Line, New Jersey; Mechanical Equipment of Harbor; Banking and Commercial Operations; Tariff—Charges—Rates; Stevedoring—Longshoremen—Pilotage; Disposal of Municipal Waste; Handling of Building Material; Condi-

in size and stature as America's primary immigration station. The absence of any discussion of Ellis Island in the legislative history and in the amendment itself reflects the reality that its sovereign status was not a contentious issue at the time. Their silence is conspicuous in at least three respects.

First, the Commissioners were not blind to the Port of New York as a focal point for the activities of foreign countries, and presumably, their citizens arriving at the Port. In the Report they note that "New York has become the established gateway between the United States and foreign countries." Report at 6. In the Summary they explain the necessity of a Port Authority by pointing out that "[s]ome eight million persons live within twenty-five miles of the Statue of Liberty in New York Harbor." Summary, *N.Y. Legis. Docs.*, 144th Sess., No. 33, at 6 (1921).

Second, the Report devotes several pages to set forth the "Main Criticisms" of the proposed Compact between the States, *see* Report at 45-51, which were offered in public discussion after the participants had been given the chance to examine a draft of the proposed Port Authority Act. There is no mention of Ellis Island in the criticisms.

Third, the Report points to certain shortcomings in the 1834 Compact without discussing Ellis Island. The Report states that the 1834 Compact "furnishes at once an historical precedent and a classical example for us to follow," but further elaborates that "[f]or our present purposes, however, it is defective and inadequate in many respects." Report at 159. As its only example of such

tions at New York Piers; Barge Canal Terminals; Canals and Waterways; Private Terminals; Warehouses; Ferries; Handling of Fuel; Handling of Ice; Handling of Grain; Express Business; Electric Power Supply; Water Supply; Trucking; Channels and Dredging. *See* Report at 17.

inadequacies, the Report points to "the regulation of the rates of ferriage," made tortuous by the ambiguous language of the Compact. *Id.* at 159-61.

The omission of any discussion of Ellis Island in these documents, as well as the amendment itself, is curious given the conflicting claims the Island has generated in this litigation. The question of how to read this silence is an important one. It shows at a minimum that neither State was intimately involved with the operations on the Island, nor did either State plan to incorporate the Island into the operations of the Harbor in the future. The Island was by all appearances accepted as a federal immigration enclave within the Port Authority's territorial limits. The absence of discussion about Ellis Island undermines New York's prescriptive acts because few such acts were noted and recorded during this critical period.

This silence also indicates that the current dispute was not significant, because the two antagonists were able to execute an amendment that stressed "faithful cooperation" without mentioning it. Alternatively, one could speculate that the silence showed the views of one State with respect to her sovereignty were clearly accepted by the other. The fact that the Harbor Line maps with the "Ellis' Island, New Jersey" designation were available at the time supports this inference. In the case before us, however, I am not willing to draw such far-reaching conclusions. I am most comfortable with the conclusion that the Port Authority amendment's silence is a tacit recognition of federal hegemony over the Island. This interpretation and the deference it implies undercuts New York's assertion of prescription during this period.

The Port Authority amendment process also serves as evidence of New Jersey's non-acquiescence, if not of New York's acceptance of New Jersey's position on the boundary question. Because both States had the opportunity to

discuss any and all issues of State activity in and around New York Harbor, the absence of such discussion concerning Ellis Island weakens New York's case for New Jersey's acquiescence, a proposition on which she bears the burden of proof.

(c) *The Public-Perception Issue*

New York argues that most immigrants processed through Ellis Island for entry into the United States during the peak immigration period thought that Ellis Island was part of New York, and that the general public perception confirmed this view. *See, e.g.,* Tr. 7/25/96 at 2083-87; Tr. 8/11/96 at 4079-80. Although the factual testimony in this regard at trial (principally the testimony of Drs. Hershkowitz and Kraut) was conjectural and emotional, New Jersey did not devote time to challenge this assertion except to point out that it was impossible to separate public perception between the original Island and the filled portion. *See, e.g.,* Tr. 7/29/96 at 2257.

In my view, most immigrants thought first and foremost that they were coming to America, but because they arrived in *New York Harbor* and since *New York City* undoubtedly attracted more attention than Jersey City, they possibly considered Ellis Island as part of New York. But because no poll was taken, we will never know for certain in which State most immigrants perceived they were landing. It hardly matters in any event.

While not irrelevant in analyzing a state's exercise of prescription over the land at issue, public perception as to which state is sovereign is hardly dispositive. *See supra* Part VI.D.3.

The immigrants were processed largely through the Main Building. Thus, their perception of sovereignty over the Island is not necessarily probative of public perception with respect to the filled portions of the Island.

It is uncontested that the immigration process mainly involved use of the Main Building, which I recommend that the Court find is located on the original—New York—part of the Island. In this regard, I cannot give this factor much prescriptive weight.

(d) *Taxing Activity*

Finally, New York has presented evidence of her taxing activities on Ellis Island. See Tr. 8/5/96 at 3211-37; see also Dr. Leo Hershkowitz Expert Report, *Ellis Island, the "Soft Ozie Ground"* 25 (Oct. 16, 1995) (DE 938). Whether a state has exercised taxing authority over the land in question is a factor that the Court has traditionally considered in original jurisdiction cases analyzing prescription and acquiescence. See, e.g., *Illinois v. Kentucky*, 500 U.S. at 385-86; *Georgia v. South Carolina*, 497 U.S. at 390-93; *Arkansas v. Tennessee*, 310 U.S. at 567-68; *Louisiana v. Mississippi*, 202 U.S. at 55.

New York first argues that New York City continued to tax individuals residing on Ellis Island after New York's cession of the Island to the federal government in 1800. See Hershkowitz Expert Report, *Ellis Island, the "Soft Ozie Ground"* at 25. There are at least two problems with this limited evidence.

First, New York failed to present more than a scintilla of evidence of her taxing authority in the relevant prescriptive periods before 1955. Her limited evidence from later years failed to pinpoint the filled portions of the Island. The Court recently addressed a similar issue in an original jurisdiction case. In *Illinois v. Kentucky*, 500 U.S. 380, the Court drew a distinction between Kentucky's act of sovereignty over most of the Ohio River and her absence of such acts over the "sliver" of the river at issue, "where barges and watercraft would rarely venture." *Id.* at 386. The Court noted that although Ken-

tucky had taxed craft traveling on the River, the absence of such craft on the "sliver" meant that, as to that area, "Kentucky's acts of taxation have been, at best, equivocal." *Id.* In light of the few—if any—tax-related activities that took place on the filled portions of the Island, New York's acts of taxation are similarly equivocal.

Second, New Jersey presented her own evidence that Ellis Island was included on the tax rolls of Hudson County, New Jersey, during the immigration period. Hr'g Tr. at 58. While New Jersey presented no evidence that she assessed taxes, except for utility taxes, Tr. 8/5/96 at 3283, this was to be expected in light of the United States's ownership and control over the Island, which New Jersey deemed complete. New Jersey's laws do not permit taxing other sovereigns, federal or state. Hr'g Tr. at 58. In any event, this evidence distinguished New York's limited proof of taxing authority—especially on the filled lands—from the complete and unchallenged taxing authority presented in the cases above.

New York also points to her taxing activities following the immigration period to show that individuals and corporations have paid New York State taxes since at least 1984. *See* Tr. 8/5/96 at 3211-37; NYPFF ¶¶ 272-74. These taxing activities could be acts of prescription, and, as New York asserts, there is no evidence that New Jersey directly contested New York's authority to impose these taxes. As explained above, however, by 1984 the States' dispute regarding the landfilled portions of the Island had been cemented. Therefore, New York's post-1984 taxing of these activities were not undertaken in the course of continuous and uninterrupted dominion over the Island on the part of New York. Independent of New Jersey's acts of non-acquiescence prior to 1984, moreover, by 1986 the governors from both States had entered into the Memorandum of Understanding. *See infra* Part VI.D.5.b.(3)(b). This agreement nullifies

whatever probative value these relatively recent taxing activities might have otherwise been accorded. Notwithstanding the Memorandum of Understanding, finally, New York collected these taxes for under ten years prior to the filing of this suit, hardly long enough to establish prescription under the Court's jurisprudence. For all of these reasons, New York's relatively brief taxing activities are of limited probative value to the prescription and acquiescence analysis.

(2) 1934-1954: The Labor Disputes Of The 1930s And 1940s

New Jersey's requests to the United States Department of Labor and other federal agencies for the employment of her citizens on Ellis Island construction projects also evidence non-acquiescence. The Court has consistently pointed to perceptions of the United States government in evaluating the extent of a State's exercise of prescription over the land in question. *See, e.g., Michigan v. Wisconsin*, 270 U.S. at 316 (noting the United States Land Department's recognition that land in question belonged to Wisconsin); *Louisiana v. Mississippi*, 202 U.S. at 56-57 (noting the United States Commission of Fish and Fisheries, as well as the General Land Office of the United States, had created maps that described the land at issue as part of Louisiana).

Not surprisingly, the issue of jobs heated up during the Depression years. Over this period, New Jersey representatives and unions made numerous requests to be included on the Island's register of eligible construction workers. While these requests were directed to the United States, as owner and operator of the Island, they reached high political levels not only in Washington, but in New York as well. Because New Jersey was basing her claims to jobs for her citizens on her sovereignty over the filled portion of Ellis Island, these assertions became overt acts of non-acquiescence. The fact that Washington was involved made New York aware of New Jersey's claims.

New Jersey officials and unions, led by congresswoman Mary Norton of Jersey City, asserted rights to jobs on Ellis Island. The record is replete with these exchanges. *See, e.g.*, Tr. 7/10/96 at 55-56; Tr. 7/17/96 at 889-90; Tr. 7/18/96 at 1069, 1073-77; Tr. 7/22/96 at 1371-72; Tr. 7/24/96 at 1887-89. Yet, after much correspondence and discussion, the federal contractor on Ellis Island refused to employ New Jersey workers and threatened to pull out of the contract. *See* Smith Summ. J. Aff. ¶ 78. His actions were not further challenged.

While some federal officials questioned both New Jersey's and New York's claims of sovereignty, all seemed to accept that a sharing of jobs between the States would be the equitable outcome. The following response of Charles Wyzanski Jr., Solicitor of Labor, on October 6, 1934, to a request from the Treasury Department for a determination as to state sovereignty over Ellis Island is notable:

The Secretary of Labor has asked me to acknowledge your letter of October 4 enclosing and commenting upon a letter you have received from John J. Gleeson, Secretary of the Bricklayers, Masons and Plasterers International Union.

The question that Mr. Gleeson puts is "Whether Ellis Island and Bedloe's Island are considered by the United States Government as being located in the State of New York or in the State of New Jersey."

To that question it seems to me perfectly apparent that your answer is sound: Ellis Island and Bedloe's Island are no more a part of New York or New Jersey than the Philippine Islands or Hawaii are. They are territories of the United States not falling under the jurisdiction of any one of the forty-eight states.

The specific problem with which Mr. Gleeson is concerned can, however, be settled, even though Ellis Island and Bedloe's Island do not fall within the

boundaries of the forty-eight states. *I see no reason to disagree with the formula which the Procurement Division of the Treasury Department has devised. It seems to me technically skillful, politically wise and thoroughly just.*

(PE 43) (emphasis added).

Solicitor Wyzanski's letter is revealing at several levels. First, it acknowledges that a sharing of jobs in the Island between the States ("the formula") is the best outcome ("technically skillful, politically wise and thoroughly just"). Second, Mr. Wyzanski challenges both New York and New Jersey's claims of sovereignty. He undoubtedly overstates the case by comparing Ellis Island to a United States territory like the Philippines and Hawaii. Because Ellis Island was within the territory of the (then) forty-eight states, like many other federal enclaves such as Governors Island, the federal government was still subject to the sovereignty of the states in which her property sat. *See Kleppe v. New Mexico*, 426 U.S. at 543 ("[A] State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.").

This extensive documentation on the labor disputes during the 1930s helps to establish New Jersey's non-acquiescence. Indeed, in Charles Wyzanski's grand view, these exchanges also diminish New York's prescriptive acts, because he posits preemptive federal sovereignty. These exchanges show New Jersey's resistance to New York's authority, such as it was, over construction in the filled portions of the Island. They also indicate that the States were communicating about labor issues, and by extension, the sovereignty question.

In a related context, the Commissioner of Immigration for the Port of New York, Edward Corsi, applied to the State of New Jersey for a Waterfront Development Per-

mit in 1933. *See* Application for Permit (Aug. 31, 1933) (PE 10); Form of Permit (Nov. 9, 1933) (PE 11). Edward Corsi was a prominent New Yorker; his actions manifested an understanding that although New Jersey had transferred pure property rights to the submerged lands in 1904, she retained sovereign authority in waterfront development matters. Tr. 7/19/96 at 1288-90; Tr. 7/30/96 at 2549-53; Tr. 7/22/96 at 1367-68. This view was also accepted by the Department of Treasury and the Army Corps of Engineers, who uniformly referred to the 1933 construction projects as located at "Ellis Island, New Jersey" in plans and maps, continuing federal recognition of New Jersey sovereignty which began with the Harbor Line Board Surveys in 1890. *See* Shenton Summ. J. Aff. ¶ 27 (Mar. 5, 1996) (PE 487); *see also* Letter from Assistant Secretary of the Treasury to the Secretary of War (Oct. 13, 1933) (location of work is "at the Ellis Island, New Jersey, Immigration Station") (PE 374); Report of Corps of Engineers (Oct. 24, 1933) (property is "Ellis Island, N.J. Immigration Station") (PE 376); *see also* PE 377-80 (similar designations).

Labor and wage disputes were still prominent in the late 1940s. In 1948 the assistant INS administrator on Ellis Island requested a determination from the Department of Labor as to which State's wage rates controlled for Davis-Bacon purposes. *See* Correspondence between the INS and the Dep't of Labor (PE 76-85); Smith Summ. J. Aff. ¶ 79. Several decisions were rendered by the Solicitor or Assistant Secretary of Labor that applied New Jersey's wage rates. For example, on August 18, 1938 the Solicitor, William Tyson, reviewed a contract "for repairs of turbines Nos. 4 and 5, Power Plant, Ellis Island, Hudson County, New Jersey." Decision of the Secretary of Labor (Aug. 18, 1948) (PE 85). The power plant, located in the filled portion of Ellis Island, was understood by the federal government to be in New Jer-

sey. One can fairly conclude that matters like wage rates (which must have varied between New Jersey and New York) were of interest to unions and officials of both States. By the 1940s the Island was used more as a detention center for enemy aliens and not much activity at either the federal or state level was underway. Throughout this period, New Jersey actively asserted her proprietary and sovereign interests, either directly or through surrogates such as trade unions.

(3) The Post-Prescriptive Period: 1955-1993

(a) *The 1950s And 1960s*

By 1955 the immigration era on Ellis Island had officially ended, although for years before the Island had ceased to be a significant immigration center.⁵¹ Sadly, the Island was declared to be surplus government property. *See* Gen. Servs. Admin. Declaration (Mar. 15, 1955), *cited in* Unrau Study at 1146. Attempts to sell Ellis Island to private parties brought the territorial dispute into sharper focus.⁵² Both States and their respective representatives debated the status and future of Ellis Island at length and their sovereign claims were fully reviewed.

⁵¹ As a practical matter, the peak period of immigration at Ellis Island was reached by the early 1920s. Thereafter Congress placed quotas on immigration and restricted entry. *See* Thomas M. Pitkin, *Keepers of the Gate: A History of Ellis Island* 135-36 (1975); Harlan D. Unrau, U.S. Dep't of Interior/Nat. Park Serv., *Historic Resource Study: Ellis Island, Statue of Liberty National Monument, New York-New Jersey ("Unrau Study")* 892-95 (1984) (DE 74). New processing concepts, such as immigrant inspections at United States embassies, further reduced the flow. During the World War II and Korean war years the Island served as a detention center for enemy aliens. Unrau Study at Ch. 6.

⁵² No purchase offers were forthcoming either from New York or New Jersey or their respective cities. Moreover, according to trial testimony, New York, whose original deed of 1808 contained a reverter clause (should the Island not be used for safety or defense purposes), did not activate the provision. *See* Tr. 7/10/96 at 82-84.

In analyzing the extent of a State's prescriptive acts, this Court has noted that "we are concerned not only with what its officers have done, but with what they have said, as well." *Illinois v. Kentucky*, 500 U.S. at 386. During the 1950s and 1960s much was said regarding Ellis Island by representatives of both States. Significantly, in 1962 and 1963 extensive hearings were conducted before the United States Senate. See *Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 87th Cong. (1962) (PE 143). The United States Senators from both States were actively involved. New York's Senator Kenneth Keating acknowledged: "This is a matter of interest to the Senators of New York and New Jersey." *Id.* at 64. In addition the mayors of New York City and Jersey City testified. New York City Mayor Wagner also testified about his City's involvement with Ellis Island. His testimony undermines New York's claims of prescription:

Senator MUSKIE. One other question.

I know I am not going to be able to persuade the mayor of the city of New York to give up anything that the city of New York considers to be its property, but, with respect to the legal problem which has been referred to in these hearings as to jurisdiction over the island as between New Jersey and New York, would you consider this legal problem to be a substantial obstacle to the final determination of a use for the island?

Mayor WAGNER. I would not believe so. I am sure my friends in Jersey City are very reasonable, but then I have a special attachment there because my mother was born in Jersey City. I think the question of jurisdiction could be ironed out by a meeting of the minds, if there would be an agreement on the purpose to which the island would be put.

I know that we do not assert that it is part of New York City or New York State merely because we

want to assert it. Our people think as a historical fact it is, but that should not stand in the way of any use, I am sure.

Senator MUSKIE. Assumption of jurisdiction, of course, would involve responsibility for providing services. Would the city of New York find it possible to provide services? *I understand the city has never provided services of any kind for the island.*

Mayor WAGNER. *No; it has been under Federal jurisdiction.*

Senator MUSKIE. But services such as have come from outside the island have come from the Jersey shore. As a practical matter, would this not have to be continued?

Mayor WAGNER. *Jersey is closer.*

Id. at 250 (emphasis added). Mayor Wagner's statements contradict or at least minimize New York's claims concerning the provision of services by New York City to Ellis Island during this period and earlier. *See supra* Part VI.D.3. Indeed, Mayor Wagner appears to acknowledge that Jersey City, through its proximity, may have had closer connections to the Island. This documentary evidence highlights the fragility of New York's prescriptive claims.

After the issuance of the Subcommittee Report, the States worked together to resolve the Ellis Island dispute. In June 1963 United States Senators Clifford P. Case of New Jersey and Jacob K. Javits of New York urged Senator Muskie to arrange for a meeting of all interested parties to discuss a proposal that New Jersey and New York enter into a compact for the jurisdiction of Ellis Island. Shenton Summ. J. Aff. ¶ 73 (citing Newark Evening News (June 28, 1963) (PE 151)). Congressman (later New York Mayor) John V. Lindsay then introduced a bill concerning the future use of Ellis Island. In his supporting statement,

"he recognized that the twenty-four acres of fill on Ellis Island 'were never New York property, but as subaqueous territory, pertained to the jurisdiction of New Jersey.' His statement in the *Congressional Record*, July 24, 1963, reads in relevant part:

Ellis Island was ceded by the State of New York to the U.S. Government in 1808, and until 1861 remained a harbor defense installation of the Army known as Fort Gibson. Further quasi-military uses continued until its formal opening in 1892 as an immigration station. The new activity was matched by extensive operations on the island: The construction of 35 buildings at a cost of nearly \$6½ million; the increase in area of the original island by earthen fill and bulkhead construction from its original 3 acres, residually New York property, to 27½ acres. The 24 differential acres puzzle the task of redesignating this property to private use because these were never New York property, but, as subaqueous territory, pertained to the jurisdiction of New Jersey. A private Ellis Island would create a knotty problem in interstate jurisdiction."

Shenton Summ. J. Aff. ¶ 73 (quoting Cong. Rec. 13,300 (July 24, 1963) (PE 154)); *see also* Tr. 7/19/96 at 1214-21.

As custodian of the Island, the General Services Administration ("GSA") also had occasion to comment on the Island's legal status. An extensive legal opinion by Henry Pike, special assistant to the General Counsel of GSA, carefully analyzing both States' rights under the Compact, has become a much-documented part of the record of these proceedings. *See* Ellis Island, Its Legal Status (Feb. 11, 1963) (PE 144). The GSA adopted the opinion.

I find the legal opinion of Mr. Pike to be highly probative. He produced a comprehensive analysis of the legal history and reviewed many of the documents and cases discussed in this record. After doing so, he concluded that the 1833 Ellis Island to the low-water mark was New York territory, while the surrounding territory was New Jersey's:

On the basis of the foregoing, it is concluded that Ellis Island proper is a part of the State of New York, it, together with Liberty Island, constituting true exceptions to the boundary line as otherwise fixed by Article First of the 1833 compact between the States of New York and New Jersey. This conclusion is in accord with the conclusion reached in the memorandum dated June 21, 1961, from the American Law Division of the Legislative Reference Service of the Library of Congress to the Honorable Kenneth B. Keating, the junior Senator from New York. *Under the conclusion reached in this memorandum, the term Ellis Island includes all the land to the low water mark around the island as of September 16, 1833. The submerged lands outside that low-water mark, including such areas as may have been filled in since the date of the compact, are deemed to be a part of the State of New Jersey, subject to such police jurisdiction thereover as is vested in the State of New York by Article Third of the 1833 compact. This conclusion accords with the position intimated, but not decided, by the Assistant Attorney General of the United States for the Lands Division, in a letter dated April 22, 1960, to the General Counsel of General Services Administration, wherein he referred to "a distinct possibility that the final decision [on a suit to determine the status of Ellis Island] would be to the effect that different parts of the island are subject to the sovereignty of different States (New York and New Jersey)".*

Id. at 70 (alteration in original) (emphasis added).

Mr. Pike further concluded that New Jersey was therefore entitled to the filled portions of the Island. His eighty-two-page report concludes with the following summary:

The United States has title and exclusive jurisdiction over that [original 3-acre] part of the Island [that is New York's], both being derived from the State of New York. The remainder of the Island, containing approximately 24.5 acres, and the submerged land surrounding the Island are a part of the State of New Jersey. The United States has title to that remainder of the Island and to approximately 20.5 acres of submerged lands surrounding the island, having derived it from the State of New Jersey. The United States has only a proprietorial interest in both such areas, except that it has a partial (criminal) jurisdiction over such part of the still submerged lands that are covered by the Act of May 7, 1880, of the State of New York, the United States having been ceded the "exclusive jurisdiction" which was vested in the State of New York by Article Third of the 1833 compact between the States of New York and New Jersey, and which would now be described as partial jurisdiction or criminal jurisdiction.

Id. at 81-82. Mr. Pike's report was widely circulated and reviewed. It helped to form the legal basis for the United States's position in the *Collins* litigation and has been relied upon by other federal agencies, such as the NPS.

These events and documents represent only a portion of the available record evidence supporting New Jersey's non-acquiescence during this period. It is evident that, had New York established sovereignty by prescription and acquiescence over the Island before this time, New Jersey would not have been treated as an equal by New York State and federal representatives in the determination of the Island's future. These statements and legal opinions undercut New York's legal claims. In sum, activities dur-

ing this period show sister sovereigns hard at work to determine Ellis Island's future.

(b) *The 1970s To 1993*

From the many suggestions for future uses of Ellis Island, the concept of a federal immigration museum took hold and prospered. Today the Main Building, where immigrants arrived and were processed, has been beautifully restored. This classic 1903 Beaux Arts structure was brought back to life in the 1980s as part of the Statue of Liberty Centennial project. The NPS is now the custodian of Ellis Island and the Statue of Liberty; the two sites form a national park that draws over two million visitors per year.

Throughout the 1970s and 1980s the NPS engaged in a variety of planning initiatives that involved representatives from both New Jersey and New York. It is not necessary to detail those activities here. In this period the NPS sought to stay neutral on the pulsating sovereignty question. Significantly, however, the NPS labelled the cover and title page of its planning documents "Ellis Island—New York and New Jersey." *See Analysis of Alternatives for the General Management Plan, Statue of Liberty National Monument, New York/New Jersey* (Dec. 1980) (PE 484);⁶³ That document contains the following description of the "regional setting":

Both Islands lie on the New Jersey side of the state line; however, all of Liberty Island and the original 3.5-acre portion of Ellis Island belong to the state

⁶³ Henry Pike, who wrote this analysis, was also involved with GSA's efforts to dispose of Ellis Island to the States or others. In the course of that effort, New York's witness, Dr. Kraut, stated that Pike became "frustrated," a conclusion he based on the "tone" of Pike's report. Tr. 7/30/96 at 2447-49; *see also* Tr. 8/15/97 at 4045-47. While Ms. Kramer (for New York) cleverly referred to this alleged frustration as "Pike's Pique," I cannot find anything in the record that would undermine Mr. Pike's credibility.

of New York. The remainder of Ellis (24 acres created by landfill), the submerged lands, and the surrounding waters are part of the state of New Jersey.

Analysis of Alternatives for the General Management Plan at 9. That description reflects the NPS's overall view of this case; through its public distribution of the documents it also makes the public aware of both States' claims. *See also* Harlan D. Unrau, U.S. Dep't of Interior/Nat. Park Serv., Historic Structure Report: Ellis Island, Statue of Liberty National Monument, *New York-New Jersey* (1981) (DE 952) (emphasis added).

After the Main Building was restored, the NPS engaged in planning efforts for the buildings on the remainder of Island One and those on Islands Two and Three. Efforts were ongoing and involved officials from both States. In 1984 the NPS (through its historian Harlan D. Unrau, an expert witness for New York in this case) nominated the property for inclusion in the National Register. The form Mr. Unrau filled out declared Ellis Island to be both in "New York County, New York" and "Hudson County, New Jersey."⁶⁴

Intermittently during this period the governors of both States sought to resolve their differences over Ellis Island. The final attempt was made by Governors Cuomo of New York and Kean of New Jersey. They signed an agreement on June 23, 1986 that sought to place revenues each State received from Ellis and Liberty Islands into a trust fund for the benefit of the homeless population. *See* Memorandum of Understanding in Regard to Establishing a Bi-State Public Corporation to Be Known as the Statue of Liberty Trust Fund (PE 180) (App. H); *see also* Tr.

⁶⁴ At trial Mr. Unrau sought to distance himself from that geographic description, saying it had been prepared by others and merely reviewed by him. Tr. 7/26/96 at 2188-97. I find that he was the party responsible for the statement.

7/10/96 at 50-54; Tr. 8/15/96 at 4051-53. This agreement never went into effect because it was not approved by the New York legislature. Tr. 7/10/96 at 53.

These actions, among others, leave the clear impression that both States were trying to resolve a nettlesome issue with regard to sovereignty over Ellis Island. So long as the NPS was administering Ellis Island on behalf of the federal government, the sovereignty question was manageable. It was only after the *Collins* case was decided that New Jersey decided it was time to seek resolution by this Court.

6. *Summary Of New York's Prescriptive Acts And New Jersey's Non-Acquiescence*

I draw two principal conclusions based on this evidence. First, while New York through the City of New York probably had more contact than did New Jersey (or Jersey City) with Ellis Island—particularly with the Main Building on the original Island—during the crucial 1890 to 1934 period, New York has not sustained her burden of showing that she has prescribed the filled portion of the Island during the critical eras. Instead, her acts were intermittent, often inconclusive and certainly disputed. Even assuming, *arguendo*, sufficient proof of prescription on New York's part, New Jersey did not acquiesce in her neighbor State's actions during the telling historical periods. The record reflects that from 1890 until this case was filed, New Jersey made consistent assertions of her underlying sovereign claims despite the pervasive federal presence in the Island's life. The substantial non-acquiescence evidence New Jersey has placed in the record easily rebuts New York's claims of prescription.

Although she later retreated from this position, New York initially argued that the *only* act of non-acquiescence New Jersey could have asserted would be to commence

litigation before this Court. *See* Tr. 7/29/96 at 2316-17. Since the trial, New York has somewhat relaxed that standard, stating that "[n]o state has ever proved non-acquiescence in a compact case without first filing a timely lawsuit against the State that co-signed the compact *or, at the very least, asserting its claim by other legally cognizable means.*" N.Y. Post-Trial Mem. at 38 (Oct. 3, 1996) (DI 365) (emphasis added). New York has cited no precedent for a standard that demands the filing of a lawsuit, and I have found none. *See supra* Part VI.A. To impose such a standard here given that the United States has possession and control of the Island would be particularly inappropriate, because many of New Jersey's acts of non-acquiescence have been directed to the United States rather than New York.

New York's attempts to cobble together intermittent and equivocal prescriptive acts from each period apparently assume that the legal value of prescription is greater than the sum of its parts. Moreover, her prescriptive acts were repeatedly refuted by New Jersey's assertion of dominion over the landfill. In none of these periods, therefore, is New York able to demonstrate the unequivocal acts of prescription demanded by this Court's jurisprudence. *Cf. California v. Nevada*, 447 U.S. 125, 130-32 (1980) (evidence established California's recognition of a putative boundary for over one hundred years); *Arkansas v. Tennessee*, 310 U.S. at 567-72 (applying the doctrine where the unchallenged evidence showed unchallenged an unequivocal dominion by Tennessee for one hundred and fifteen years); *Louisiana v. Mississippi*, 202 U.S. at 53-57 (involving over ninety years of acquiescence by Mississippi). A more accurate assessment of the activity of the States during these periods comes from the Court's decision in *New Jersey v. Delaware*, 291 U.S. at 377: "Acquiescence is not compatible with a century of conflict."

VII. REMEDY: DRAWING THE BOUNDARY ON ELLIS ISLAND

A. Nature Of The Role Of Special Master

Drawing an appropriate boundary line on Ellis Island raises an interesting question about the nature of the Court's and therefore the Special Master's role in an original jurisdiction case. As Special Master, I am compelled to operate in two capacities. Because the Court delegated legal authority to interpret the Compact of 1834 and apply the doctrine of prescription and acquiescence, I view my role as equivalent to that of a court of law. Thus, in finding that this Court should draw the boundary at the low-water mark of the original 1833 Island, I apply well-settled jurisprudence to the issues and focus on legal principles, rather than equitable ones. The relevant question at this juncture, however, is whether I am free to recommend a remedy based not solely on legal principles but also in part on notions of equity. A review of the relevant cases compels me to fashion a remedy that is just, fair, and convenient to the parties and the public.

In original jurisdiction cases, this Court sits in equity as well as at law. *See New Mexico v. Colorado*, 267 U.S. 30, 33 (1925) ("This is a suit in equity, within the original jurisdiction of this Court, brought by the State of New Mexico against the State of Colorado, in 1919, to settle a controversy as to the location of their common boundary line."); *see also Texas v. New Mexico*, 462 U.S. 554, 569 (1983) (pointing to the Court's "equitable power to apportion interstate streams"); *Arizona v. California*, 373 U.S. 546, 565-66 (1963) (same); *United States v. California*, 332 U.S. 19, 26 (1947) (actions to determine sovereign boundaries "are in the nature of equitable proceedings"); *Kansas v. Colorado*, 185 U.S. 125, 145 (1902).

The Court has long reached equitable conclusions in resolving original jurisdiction cases. In *Maryland v. West*

Virginia, for instance, the Court concluded that “[u]pon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected.” 217 U.S. 1, 46 (1910). In *Handly's Lessee v. Anthony*, Chief Justice Marshall, speaking for the Court, explained that

in great questions which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals.

18 U.S. (5 Wheat.) 374, 383-84 (1820). The Chief Justice was writing at a time when “great questions” of state boundaries were indeed being determined by this Court, one of which, of course, was the very *New Jersey v. New York* case that would come before him a few years later in 1829.

A century later, in *Vermont v. New Hampshire*, Vermont brought suit before the Court “for the determination of a boundary line between that state and the state of New Hampshire.” 289 U.S. 593, 595 (1933). The issue was whether New Hampshire was sovereign over the lands on the west bank of the Connecticut River, which separates the two states. The key document was another early English precedent—an Order of the King-in-Council of King George III. Significantly, the 1664 grant from Charles II to the Duke of York, central to our case, was invoked there as well. This Court found it “difficult to conclude that in settling that dispute [between New Hampshire and New York over the authority to grant land west of the Connecticut River] it was intended to deny to New

York or the grantees lawful access to the river." *Id.* at 605. This Court ultimately reached the conclusion that New Hampshire's territorial line would extend to the low-water mark, not the high-water line, as she had argued. *Id.* at 612-13.

In reaching its decision, the *Vermont v. New Hampshire* Court relied on Chief Justice Marshall's opinion in *Handly's Lessee*:

"Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. . . . Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes the boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark."

Id. at 606 (quoting *Handly's Lessee*, 184 U.S. at 380-81); see also *Missouri v. Iowa*, 48 U.S. (7 How.) 660 (1849) (states are bound by the practical line that has been established as their boundary, although not precisely a true one).

In *New Jersey v. Delaware*, 291 U.S. 361 (1934), the Court determined that the boundary between the states below a twelve-mile circle about New Castle is the thalweg of navigation in the Delaware River and Delaware Bay. The Court adopted the thalweg boundary despite the argument that the geographical center of the River and Bay would be the proper place to draw the boundary. The Court noted that at one point the thalweg would be an inconvenient boundary because it would take a "sharp turn." Nonetheless, that inconvenience was balanced against the more pervasive inconvenience of having the River and Bay boundary drawn at the geographic center. The Court explained that

the inconvenience is a reason for following the *Thalweg* consistently through the river and the bay alike instead of abandoning it along a course where it can be followed without trouble. If the boundary be taken to be the geographical centre, the result will be a crooked line, conforming to the indentations and windings of the coast, but without relation to the needs of shipping. If the boundary be taken to be the *Thalweg*, it will follow the course furrowed by the vessels of the world.

Id. at 385 (citation omitted). The Court observed that "[t]he underlying rationale of the doctrine of the *Thalweg* is one of equality and justice." *Id.* at 380. Where, as here, the "true" boundary cannot be rationally adopted or even determined, the same considerations of justice and convenience are an appropriate guide to a remedy.

In recommending that the interstate boundary on Ellis Island be drawn with convenience in mind, and that surveyors be called upon by both States to describe that boundary in metes and bounds, I also draw strength from the special master's recommendations and the Court's holding in the more recent case of *Ohio v. Kentucky*, 444 U.S. 335 (1980). There the Court found the boundary line to be "the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 . . . not the low-water mark on the northerly side of the Ohio River as it exists today." *Id.* The Court observed:

Locating that line, of course, may be difficult, and utilization of a current, and changing, mark might well be more convenient. But knowledgeable surveyors . . . have the ability to perform this task. Like difficulties have not dissuaded the Court from concluding that locations specified many decades ago are proper and definitive boundaries.

Id. at 340. The Court therefore accepted the special master's recommendation that, after the Court's decision

on the merits, the precise boundary should be determined either by the parties' agreement, "if reasonably possible," by a joint survey, or by the special master after conducting his own survey in a follow-up hearing. *Id.* at 336-37.⁵⁵ The precise boundary determination there was not an easy one to draw. It took another five years after the Court's decision on the merits to complete. *See Ohio v. Kentucky*, 471 U.S. 153 (1985). Thus, while I am proposing a similar procedure, as set out below, it is my judgment that it can be implemented promptly and therefore may be accomplished before the filing of exceptions (and without prejudice thereto).

I thus respectfully recommend the exercise of this Court's equitable powers in the remedy phase of this proceeding. I acknowledge that neither the Court nor its Special Master can draw boundaries that do not respect the boundaries set by the States themselves with congressional approval. Under principles of separation of powers, the congressional expression of state sovereign will control. I am confident that my recommended remedy respects these constitutional principles; it is squarely based on my analysis of the intrinsic and extrinsic evidence, the consequent determination of the Island's boundaries, and the areas of land to which the respective States are entitled. The principles of flexibility and practicality I recommend do not undermine but fulfill the sovereign will as set forth in the Compact of 1834. *See supra* Part II.B. (quoting congressional standards established by this Compact).

⁵⁵ *Cf. California v. Nevada*, 447 U.S. 125, 132 n.9 (1980) ("[T]he Master recommends that he be authorized to arrange for surveys, at the parties' expense, if necessary to resolve disputes over the precise location of portions of either of the lines we approve today. That, too, seems appropriate."); *see also United States v. California*, 332 U.S. at 26 (It is a "commonplace" practice to generally determine the sovereignty over land but hold detailed hearings later "to determine with greater definiteness particular segments of the boundary.").

B. The Precise Boundary

To draw a boundary between the States on Ellis Island that reflects the area of the Island at the time of the Compact of 1834, three discrete questions must be addressed: (1) Should the boundary of the original Island be drawn based on the mean low-water ("MLW") mark or mean high-water ("MHW") mark?⁵⁶ (2) How much area does the boundary of the original Island encompass on the present Island? and (3) What should be the shape and configuration of the original Island boundary line on the present Island?

1. *Mean Low-Water Mark Versus Mean High-Water Mark*

New Jersey has prayed for the following relief:

That the boundary line be declared to be the former mean high water line of the original natural island, approximately 3 acres in size, so that the original island is thereby declared to be within the territory and jurisdiction of the State of New York, and so that the balance of the island, approximately 24.5 acres in size, and the surrounding waters, are thereby declared to be within the territory and jurisdiction of the State of New Jersey. . . .

N.J. Compl. at 15. New Jersey argues thus that the boundary line on Ellis Island should be drawn at the MHW mark.

She bases this view on Articles Second and Third of the Compact of 1834. Article Second, she points out, addressed the Island "as it existed in 1834" and "Article III gave New Jersey property rights in all under water

⁵⁶ The concept of "mean" high and low water describes a systematic calculation of observations over time, a process that the experts at trial explained was not always available in early map- or chart-making. See Tr. 8/1/96 at 2943-44; N.J. Post-Trial Br. at 11-13. My use of the term is informed by this testimony.

lands in the western part of the Hudson River and Bay of New York." N.J. Post-Trial Br. at 11. Because property rights "are an attribute of sovereignty and extend to all tidally flowed lands or navigable waters up to the mean high water line," *id.*, it is the MHW mark that defines the boundary according to New Jersey.

For further support, she looks to New York's 1808 cession to the federal government, which was an area of under three acres above the high-water line. *Id.* at 12; *see also* Tr. 7/11/96 at 326-27; Castagna Expert Report, Ex. DD (PE 478). She asserts, further, that while New York did attempt to deed her land under water to the United States in 1880, that conveyance was nullified by New Jersey's similar grant to the United States in 1904. N.J. Post-Trial Br. at 12.

New York City, arguing for New York, counters that "[t]he 'sovereign-holding-to-high-water-mark' theory is untenable" because, first, "it applies only to a state's own citizens and their private holdings"; second, navigation should not be impeded for the uplands owners; and third, "where two sovereigns share a boundary on tidally flowed waters, the teaching of *Handly's Lessee* is that the sovereign owner of title and jurisdiction over such a river holds to the low-water, not the high-water mark on the shores of the sovereign whose territory is merely bounded by the river." The City Post-Trial Br. at 24 (citation omitted). New York's position is that, if a boundary be drawn on the Island, it should be at the MLW mark. She relies principally on her interpretation of the boundary line the drafters of the 1834 Compact must have intended to draw, based upon the negotiations and language of the Compact.

None of the cases cited by New Jersey support that State's contention that the high-water mark is the appropriate boundary line on Ellis Island. The cases she relies upon are not interstate border cases, but rather address

whether the states acquired property and dominion from the federal government over underwater soils within state limits.⁵⁷

I agree with New York's proposed boundary around the 1834 Island, but not with all of her reasons. Like New York, I rely primarily on the apparent intent of the parties. While the Compact itself is silent on the dimensions of the Island, the prior settlement negotiations addressed the relationship between MLW and MHW marks and territorial limits.⁵⁸

But, significantly, during Compact negotiations New Jersey accorded New York sovereignty over Ellis Island "to the low water mark." See *supra* Part IV.B.2.b.(1)(b). Admittedly this language, while part of earlier concessions, was not contained in Article Second of the Compact. Nevertheless, nothing in the pre-Compact negotiations contradicted such a construction and by 1833 New York had conceded that she would not press her claim to the Hudson River on the New Jersey side beyond the MLW mark.⁵⁹

⁵⁷ New Jersey relied on the following cases: *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423 (1867); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842). N.J. Post-Trial Br. at 11.

⁵⁸ New Jersey's reliance on *United States v. California*, 382 U.S. 448 (1966) for the proposition that as a general rule an island is defined with reference to the high-water mark is not compelling. The case does not involve the Court's own conclusions on low-water mark versus high-water mark; instead, the Court merely adopts with some modifications the decree authored by the special master and the parties. See *id.* at 448. In that respect, neither the Court nor the special master was articulating a rule of riparian law. The case merely constitutes the Court's acceptance of the parties' definition for purposes of approving their proposed decree.

⁵⁹ This was a reversal of her earlier position claiming the Hudson to the MHW mark on New Jersey's shore and challenging New Jersey's ability to build wharves and improvements. See *supra* Part IV.B.2.b.(1)(a).

Because there is no discussion of the size of Ellis Island (or any of the other islands) in Article Second, the question remains open to interpretation.

In the course of negotiating the Compact, both sides seem to be assuming that the low-water mark, not the high-water mark, would define the respective territorial limits, however they came out. This assumption was a product of longstanding negotiations. It may well have been influenced, as New York has argued, by this Court's 1820 decision in *Handly's Lessee*, which had granted to Kentucky rights in the Ohio River to the low-water mark of the Indiana shore line. See *supra* Part VII.A. Chief Justice Marshall's opinion held that "it would not be doubted that a country bounded by the river would extend to low water mark. This has been established by the common consent of mankind." *Handly's Lessee*, 184 U.S. at 602. The conduct of the parties and the legal assumptions under which they were operating indicate that they intended to have the Island boundary extend to the low-water mark.

While I cannot resolve with complete confidence what the parties intended with respect to the Island's MHW mark or MLW mark in the 1833 Compact, contemporary understanding and relevant judicial decisions make the 1833 size of Ellis Island to the MLW mark the more plausible construction. I therefore recommend that the Court grant to New York sovereignty over the original or 1833 Ellis Island to the low-water mark thereof.

In addition to construing the intent of the parties under the Compact, I invoke practicality and public convenience in drawing the boundary at the low-water mark. As noted above, in both *Handly's Lessee* and *Vermont v. New Hampshire*, the Supreme Court cited public convenience as a factor in drawing an interstate boundary at the low-water mark. Quoting *Handly's Lessee*, the *Ver-*

mont v. New Hampshire Court noted that, as regards the boundaries of a river, it would be "‘extremely inconvenient’" to accord sovereignty to one State to the land to the high-water mark or vegetation line, and to accord to the other State sovereignty on the land below the high-water mark. 289 U.S. at 606. Similarly, here it would be "extremely inconvenient" for New York not to exercise sovereignty to the MLW mark. If the MHW mark is invoked, on some parts of her territory on the original Island, a thin strip of tidelands could conceivably prevent her from accessing New York Harbor from the Main Building on Ellis Island without crossing New Jersey sovereign territory.⁶⁰ Public convenience thus counsels that New York should have access to the Harbor from her sovereign territory. Drawing the boundary at the MLW mark satisfies this concern.

For all of the reasons above stated, and because New Jersey, who bears the burden of proof in this respect, has not convinced me otherwise, I find that the MLW mark of the original Island is the appropriate starting point in drawing the sovereign boundary on the Island today.

2. Area Of Land Accorded Each State On The Present Ellis Island

To determine the total area accorded each State on the present Island, I have relied upon the maps that most accurately depict the shape and size of the original and present Island to the low-water mark. I have also relied upon the credible testimony of New York's scientific experts, Dr. Squires and Captain Swanson, who estimated the area of the original Island above the MLW mark as

⁶⁰ The fact that I ultimately reconfigure the precise boundaries of the MLW mark on the present Island does not obviate a threshold consideration of convenience in determining where the boundary line on the original Island was meant to be drawn.

depicted in several maps.⁶¹ Comparing that figure to the total area of the Island as depicted in a recent map, the area of both States' sovereign territory at present can be estimated.

Because current technology for evaluating and mapping MLW and MHW marks was unavailable in 1833, the best the Court can do to estimate size of the Island over one hundred sixty years ago is engage in speculation informed by contemporaneous mapping and the credible testimony of scientists. I am satisfied that the experts from both States who testified on the boundary issue and surveyed the Island are as qualified as anyone could be to draw conclusions about its past and present size. The possibility of neater precision has been doomed, not only by the lack of technology earlier, but also by the passage of time.

I find that the 1857 United States Coast Survey map advocated by New Jersey for use in delineating the boundary on Ellis Island most accurately depicts the size and shape of the original Ellis Island to the MLW mark. *See* App. I. I rely substantially on the testimony of one of New Jersey's experts, Richard G. Castagna.⁶² Mr. Castagna determined that the 1857 United States Coast Survey map, and the enlargement thereof, were "highly accurate,"

⁶¹ While I will continue to use the term "mean low water" it should be noted that some of the maps discussed did not employ techniques designed to produce a mean. *See supra* note 56.

⁶² When I inquired of New York's expert witness, Dr. Squires, whether, despite his reservations about the 1857 map, he had a better map to offer, he said "I have not made a judgment on that." Tr. 8/7/96 at 3349-50. Thus my decision to adopt the 1857 map as the best available evidence, even though potentially flawed, benefits not only from Mr. Castagna's convincing testimony, but also from the thought that it is the best we can do (or, to borrow from Sir Winston Churchill's description of democracy, it is the worst map except for all of the others).

Tr. 7/11/96 at 301, 306, and provide the most reliable depiction of the size and contours of the original Ellis Island, *id.* at 427-29.

Mr. Castagna concluded that the 1857 map was the most precise map available between 1834 and the start of the landfilling activities in the 1890s on several reasonable bases. One, the United States Coast Survey map-makers are presumptively careful and reliable. *Id.* at 304. Two, the 1857 map was prepared specifically to depict only Ellis, Bedlow's (Liberty), and Governors Islands, *id.* at 300, rather than a greater portion of New York Harbor, and thus does not sacrifice accuracy for breadth, *id.* at 429-30. Three, the enlargement of the 1857 map depicts the northeastern seawall of Liberty Island at the same locations as a reliable 1980 map of the islands, allowing the seawall to be used as a control point. *Id.* at 415-22; Tr. 7/12/96 at 568-70; Tr. 7/17/96 at 817-18. Mr. Castagna found the 1980 map "extremely accurate," Tr. 7/11/96 at 404, and further noted that it meets today's stringent national map-accuracy standards, *id.* at 406-08. Thus, the coincidence between the two maps is important. Four, relying on the location of Fort Gibson on the 1857 and 1980 maps, Mr. Castagna compared these maps with a survey of Ellis Island prepared in 1995 by the New Jersey Department of Transportation, which he regarded as "precise" in conjunction with the other maps. *Id.* at 422-26, 429.

Mr. Castagna concluded that the 1980 map and 1995 survey of the Island accurately depict the current size and contours of Ellis Island. *Id.* at 402-26. The 1980 map was created using aerial photography and depicts only Ellis and Liberty Islands, thus providing extensive detail. *Id.* at 402-04. New York did not contest the accuracy of this map.

Although New York contested Mr. Castagna's reliance on the 1857 map, I did not find her efforts convincing.

One, she was not able to elicit testimony that would dissuade Mr. Castagna, or me, from the conclusion that the 1837 map, which New York prefers, and which is closer in time to the 1834 Compact, provides a less accurate depiction of the original Island. The 1837 map is simply not as detailed as the 1857 map; its accuracy is not buttressed by the 1980 map and 1995 survey of the Island in the way that the 1857 map is. *See* Tr. 7/12/96 at 565-69; Tr. 7/17/96 at 818-19. Two, she was not able to cast doubt on Mr. Castagna's conclusion that no fill (beyond part of an earlier created pier) was added to the Island itself between 1834 and 1857. *See* Tr. 7/12/96 at 570-71, 584-86. Finally, despite her extensive cross-examination of Mr. Castagna in this regard, New York did not succeed in refuting his identification of the seawall on Liberty Island in the 1857 and 1980 maps. Mr. Castagna satisfied me that he could distinguish between the water marks and the seawall depicted in both of these maps. *See* Tr. 7/11/96 at 309-11; Tr. 7/12/96 at 478-79, 496-502; Tr. 7/17/96 at 812-15. Mr. Castagna did not, however, offer an opinion as to the size of the original Ellis Island at the MLW mark, which is also depicted on the 1857 map. *See* Tr. 7/12/96 at 487, 492-93, 496-97, 547, 579-81.

While I accept Mr. Castagna's testimony that no fill was added to Ellis Island between 1833 and 1857, I do not agree that no fill was added to Ellis Island before 1833, *see* Tr. 7/10/96 at 250; Tr. 7/11/96 at 338, especially as that conclusion relates to the "L-shaped pier or dock" at the southwest side of the original Island. This pier is clearly defined in the 1819 map, *see* Castagna Aff., Ex. G (PE 479) (reproduced as App. J), and much time was spent at trial to determine if it was undergirded by fill. Dr. Squires testified that at least half of the pier was supported by artificial fill. Tr. 8/1/96 at 2927-45; Tr. 8/2/96 at 3020-23. I am convinced by that testimony for the following reasons: (1) The 1839 chart

shows a filled area around at least two thirds of the dock; and (2) Logically, according to Dr. Squires, this dock was initially constructed to carry ammunition by rail car to the cannons at the Fort Gibson redoubts, and it needed to be structurally sound. Moreover, as Dr. Squires added, pile-driving techniques (as an alternative to fill) adequate to hold such weight were not in use at that time. Tr. 8/1/96 at 2932; Tr. 8/2/96 at 3022-35.

The consequence of including this pier as part of the fill to the pre-1833 Island is to make a small addition to New York's land. This difference can be illustrated best by looking at the various overlays of the original Island over the present Island. Mr. Castagna's tidelands map, Castagna Expert Report, Ex. AA (PE 478), excludes the dock, whereas the historic base map, prepared by the NPS (App. F) and supported by New York, includes it. I follow the latter version in drawing the boundary.

I further find that the survey map prepared by another New Jersey expert, Lewis J. Marchuk, most accurately depicts the current size and shape of the Island. At the request of the State Attorney General's Office of New Jersey, in September and October of 1995, Mr. Marchuk prepared a "location and area survey" of the present Ellis Island. Tr. 7/15/96 at 645. He prepared this survey with the assistance of a "Geodetic Survey Unit," including Frederick A. Czepiga, an experienced licensed surveyor; Ronald J. Kuzma, a senior engineer at the New Jersey Department of Transportation; Edward Berchtold, an experienced engineering technician at the Department; Charles Lesko, an experienced engineering technician at the Department; and Michael Cline, a "national geodetic survey advisor" to New Jersey. *Id.* at 646. Utilizing what the parties appear to agree was state-of-the-art equipment, Mr. Marchuk and his team set up eight "control points" on the Island with which to calculate the area and location of the Island. *Id.* at 646-52. In addition, utilizing similar state-of-the-art methodology, they located the

southerly and northerly angle points of Fort Gibson Wall on the Island. *Id.* at 652-53. New York did not object to the accuracy of this map. I am satisfied that Mr. Marchuk's survey and testimony provide the Court with an accurate description of the location of the angle points of Fort Gibson on the Island, and that the survey accurately describes the size and shape of the present Island.

Finally, I turn to Dr. Squires's and Captain Swanson's testimony.⁶³ Utilizing what the parties again appear to agree is state-of-the-art methodology, these experts estimated the total area of the original Island above the MHW and MLW marks on several historical maps, including the 1857 map. For convenience, I set out in the table below the various sizes of the five charts or maps that Dr. Squires and Captain Swanson considered.⁶⁴

Date of Map or Chart	Area above MHW (acres)	Area from MHW to MLW (acres)	Area above MLW (acres)
1819 ⁶⁵	3.26	2.00	5.26
1836	3.73	2.21	5.94
1841	3.75	1.44	5.19
1857	2.97	1.72	4.69
1879	3.18	1.41	4.59

⁶³ Testimony at trial demonstrated that these two experts worked together as a team, Tr. 8/1/96 at 2940-41, with Dr. Squires instructing Captain Swanson to make calculations utilizing equipment such as a digital planimeter. Over New Jersey's objections, I find their collaboration probative and convincing.

⁶⁴ Dr. Squires testified with respect to the numbers set out in this chart. See Tr. 8/1/96 at 2940-43, 2946-50.

⁶⁵ The 1808 transfer deed from New York to the United States described the Island as "two acres, three roods and thirty-five perches." Shenton Summ. J. Aff. ¶ 9; Tr. 7/17/96 at 974. New Jersey's expert, Mr. Castagna, translated this as 2.97 acres:

Two acres is two acres. A square rood is a quarter of an acre. So three square roods is three quarters of an acre. One perch

There are several ways to utilize the information set out in this table in shaping the remedy phase of this case. For one, given the boundary determination in this recommendation, these area estimates set the outside parameters of New York's claims to the original 1833 Island as established by her witnesses and demonstrate that accretive changes to the fast land of the Island in the period from 1833 to the commencement of land-filling are negligible. While I have accepted the 1857 map as the best estimate of the "original" Island, I could also have used these five area estimates above to calculate an average. The MLW mark average would be 5.13 acres and the MHW mark would be 3.39 acres. Such an exercise would assume that no one map was any more reliable than any other and therefore spreading the margin of error would produce a more reliable "mean" error.

Instead, I have chosen the 1857 map as the most reliable, based upon the testimony at trial. In so doing I have decided to accept its MLW size of 4.69, as calculated by New York's own experts, with one small addition. I have added the one half of the pier not included in Dr. Swanson's more conservative calculation. Conservatively, this would add about 0.2 acres to MLW. Thus, the 4.69 MLW mark acres calculated from the 1857 map and an additional 0.2 results in a MLW total of 4.89 acres, or close to five acres. Accordingly, I conclude that, consistent with the MLW boundary lines of the original Island, New York's sovereign area on the present Island is almost 5 acres. New Jersey's sovereign area is the difference between New York's territory and the 27.40 acres of the entire Island as surveyed by her expert, Mr. Marchuk. This will total about 22.5 acres, as the next section explains.

is $16\frac{1}{2}$ feet. If you squared $16\frac{1}{2}$ feet and then you multiplied that by 35, you would come up with 2.97 [acres].

Tr. 7/11/96 at 326-27 (Mr. Castagna for New Jersey).

In working with such detailed calculations, I am mindful of Dr. Squires's admonition that it is difficult if not impossible to estimate acreage of a 140-year-old map to the tenths (or certainly hundredths) of an acre. Tr. 8/1/96 at 2950-52. He was comfortable with a range of 3 to 3.75 acres for MHW mark and 4.50 to 6 acres for MLW mark. *Id.* This range, proffered by New York's own expert, strikes me as reasonable, realistic, and difficult to contradict. In establishing New York's territory as discussed in the next section, the range will be similarly informed. Should a little flexibility in terms of tenths of acres be needed to shape the remedy proposed, I will rely on Dr. Squires's testimony to support it.

3. *Shape And Configuration Of New York's Sovereign Territory On Ellis Island*

The most obvious way to determine the shape and configuration of New York's sovereign territory on Ellis Island is to place over the 1995 map a transparency with the 1857 map of the original Island to the MLW mark printed on it. For this purpose, I have chosen the Historic Base Map in Appendix F and compared it with Mr. Castagna's 1995 map with the 1857 overlay (which omits the dock I find connected by pre-1833 fill). By lining up predetermined reference control points, such as the seawall on Liberty Island, the boundaries of the original Island can be traced on the current map. Surveyors could determine the metes and bounds of this sovereign boundary.

This facially simple solution, however, has many shortcomings, and I am thus reluctant to use it. This "template" approach introduces impracticalities and inconveniences. It would create a sovereign territory with portions of the Main Building, the Baggage and Dormitory Building, and the Boathouse Building all intersected by the putative boundary line. *See App. F.* In addition,

New York would be left with relatively thin strips of New Jersey's sovereign territory between New York and the ferry slip. In effect, New York would be enclaved by New Jersey on the Island. Because New York City runs Circle Line boats delivering millions of visitors annually to this location, the template approach could cause disruption. By ending New York's sovereign territory along a large portion of the ferry slip in front of the Main Buildings, well short of the slip's seawall, New York would not have access to, nor authority over, the area of land most intimately and functionally connected to the operation of the Main Building, which itself would be partitioned by this approach. In this last respect, more than any other, the precise 1834 boundary, even as buttressed by the additional acreage to mean low water, would create an overly literal status of divided sovereignty that would be neither just nor fair to New York.

There is no question that, while there is nothing wrong with divided sovereignty as a remedy, it does raise complications, and therefore should be administered thoughtfully. My obligation is thus to recommend a remedy to this Court that works as well as can be in light of the reality of divided sovereignty.

The *Collins* court appeared concerned with a divided sovereignty outcome because of the "impracticability" of a "haphazard and uneven" boundary line for determining the application of workers' compensation laws. *Collins v. Promark Prods., Inc.*, 956 F.2d 383 (2d Cir. 1992).⁶⁶ Similarly, the Preservation Amici, who questioned the practicability of applying historic preservation laws to parts of historic buildings, encourage me to find a solu-

⁶⁶ I do not accept the underlying premise of *Collins*, which rejected the interpretation of the United States that the 1833 Compact granted jurisdiction over the filled lands to New Jersey. Impracticability is a relevant consideration for drawing a boundary but not for determining sovereignty.

tion that does not divide jurisdiction over the Main Building.⁶⁷

I recommend that the Court find that the most practical, convenient, just, and fair boundary line consistent with the language of the 1834 Compact and applicable law, to be as follows. First, New York should be accorded a total sovereign territory constituting at least 4.89 acres (4.69 plus a minimum of 0.2 for the pre-1833 dock) of the present Island, the amount to which she is entitled as set forth above. Second, none of the three buildings intersected by the "template" boundary of the original Island should in practice be intersected by a boundary line. Limiting New York's sovereign territory in this manner serves

⁶⁷ See Preservation Amici Post-Trial Br. at 5-10. The Preservation Amici argue that the "split jurisdiction" remedy that New Jersey proposes for the Island cannot be "implemented without adverse consequences for the Island's future as a national landmark." *Id.* at 2. Arguing that "the outcome advocated by New Jersey would necessarily give rise to future disputes over the preservation of the Island," especially if the federal government were to abandon the Island, they conclude that such disputes would create "deleterious and irreversible effects on the Island's historic buildings." *Id.* at 3. The Preservation Amici reason that New Jersey's proposed solution would create a boundary that intersects three or four of the buildings on the main Island (the portion of the Island on which the Main Building, built in 1903 as the Immigration center, is located). They are thus concerned that the boundary on Ellis Island "would wind haphazardly through the Island's core without apparent rhyme or reason." They also point to substantive differences in the States' landmark laws. *Id.* at 17-28. Finally they argue that New Jersey's proposed boundary line would require the Court to exercise "'continuing supervision'" over the Island, because of the "strange and difficult" boundary that New Jersey proposes. *Id.* at 11-16 (citation omitted).

By drawing the boundary in rectangular form as I do here, that difficulty is minimized, if not eliminated. The fact that these amici believe that New York's preservation laws and practices are superior to New Jersey's, *see id.* at 17-29, simply means that in the future they must be more creative in asserting their members' interests under that State's laws.

as a reasonable constraint on my use of practicality in recommending a remedy to this Court.

Accordingly, I find the boundary of New York's sovereign territory on the present Ellis Island to be as follows: all of the Main Building (which is encompassed substantially within the template boundaries of the original Island in any event) is included in New York's sovereign territory. New York's territory should also include all of the land in front of the Main Building, from the south corner of Island Number One, on the seawall of the ferry slip, to a point on the seawall of the ferry slip intersected by a line parallel to the northwest side of the Main Building that bisects the corridor connecting the Main Building and the Kitchen and Bathhouse.

The boundary on the northwest side of the Main Building should form a ninety-degree angle with the boundary line drawn behind the northeast side of the Main Building. The boundary on the northeast side of the Main Building will not be a straight line: it will bisect the area between the Main Building and the Baggage and Dormitory Building (thus determining the location of its intersection with the boundary line on the northwest side of the Main Building), cut diagonally at a forty-five degree angle across the corridor connecting the Baggage and Dormitory Building and the Railroad Ticket Office behind the Main Building, then continue parallel to the northeast side of the Railroad Ticket Office, at a margin of ten feet. A line drawn from the point where the east side of the triangle-shaped area on the southeast side of Island Number One intersects the southeast side of Island Number One (the "triangle line") will intersect the boundary-line behind the Railroad Ticket Office. The angle of this corner will be determined by drawing the triangle line parallel to the south side of the triangle-shaped area. If the triangle line, drawn as described above, intersects the remains of the original Fort Gibson, it should be drawn to

encompass those remains within New York's territory. This description is depicted in Appendix K.

New York's sovereign territory will thus roughly be a rectangle encompassing all of the Main Building, none of the Baggage and Dormitory Building or the Boathouse, all of the land to the ferry slip directly in front of the Building, and the entire triangle-shaped area on the southeast side of Island Number One. If more than 4.89 acres is needed to encompass the territory so described, I recommend that New York is entitled to additional territory purely for the purpose of reaching this result up to a maximum of 6 acres (which is the high side of Dr. Squires's estimate of New York's acreage to the MLW of the original Island). He stated that 6 acres "would be on the high side of our measurements but it would not be totally out of range." Tr. 8/2/96 at 3107. To be equitable to New Jersey, however, New York's territory should be contained as nearly as possible within the lower estimate of 4.89 acres, because a tidewater acre is not equivalent to an acre of fast land under any scale of values.

The proposed remedy resolves several issues of concern. First and foremost, it is a workable and clean boundary line. Second, it retains the time-honored connection between the Main Building—the immigration locus—on the original Island and the City of New York. Moreover, because the restored Main Building remains part of New York, and the ferry slip in front of it will still be New York's territory, visitors coming from the battery on the Statue of Liberty/Ellis Island ferries will continue to land on New York territory.

To be sure, all the buildings on the Island, not just the Main Building, are in the National Register of Historic Places. Thus, as the Preservation Amici point out, both States' preservation laws will apply to Ellis Island in the future. The States will be required by this outcome to

achieve a regime of mutual cooperation.⁶⁸ Moreover, as the entire Island will remain under the control of the NPS for the foreseeable future, all changes and modifications must meet that agency's stringent planning process as well as the preservation standards of state historic preservation officials.⁶⁹ Because the NPS currently consults both States about its plans, little will change in that regard in the future. The only difference will be that both States and the NPS will know the limits of their sovereign territory on the Island, something that for too long has been the subject of guesswork.

4. Summary And Subsequent Steps

I believe this boundary reflects the most appropriate reconciliation of law, equities, and practicality. It rejects the false objectivity of the template approach and creates a workable boundary. New York will retain no more total sovereign territory than she was originally accorded under the 1834 Compact. In addition, she will retain for herself the symbolism and functional integrity of the Main Building and ferry slip, the aspects of the Island perhaps most closely associated with her historic role in American immigration. New Jersey will be accorded the amount of land that has been added to the original Island on her sovereign territory,⁷⁰ and will receive

⁶⁸ This solution will create a boundary that intersects the Wall of Honor established by gifts in honor of relatives who arrived as immigrants on Ellis Island. This is not a structural entity and its shared jurisdiction seems not only manageable but appropriate.

⁶⁹ See National Historic Preservation Act, 16 U.S.C. § 470a(b) (3) (1995); 36 C.F.R. §§ 800.1(c) (1) (i), (ii) (requiring federal officials to review and consult with State Historic Preservation Officers regarding the impact of "major" federal projects on historic properties).

⁷⁰ In addition, the 0.57 acres of New Jersey territory not included in her 1904 deed to the federal government will remain within her sovereign control.

due recognition of her rightful claim to these lands and her shared role in the operations of the Island today. In the words of Charles Wyzanski Jr., who commented on the possibility of awarding jobs in Ellis Island between the two States' citizens in the 1930s, I have sought to recommend a solution to this Court that is "technically skillful, politically wise and thoroughly just." *See supra* Part VI.D.5.b(2).

Because I cannot describe my recommended remedy in precise metes and bounds, I propose to retain jurisdiction over a portion of this case until I have done so. Therefore, I shall order each State, without prejudice to her claims on the merits, to appoint a surveyor to define in precise terms the boundary I have described above. I will review the work of those surveyors (and call one of my own, if necessary) and render a recommended survey decision on the location of the precise boundary line. I expect to file this decision reflecting the results of the survey as soon as feasible following the completion of the survey work.

VIII. PROPOSED DECREE

I propose that the Court issue the following Decree, subject to any refinements that may be required by the work of the surveyors.

Respectfully submitted,

PAUL R. VERKUIL
Special Master

STATE OF NEW JERSEY

v.

STATE OF NEW YORK

No. 120, Original

Decided _____

Decree Entered _____

Decree effecting this Court's Opinion of _____

S. Ct. _____ (199).

DECREE

This Court having exercised original jurisdiction over this controversy between two sovereign States; the issues raised having been heard in an evidentiary proceeding before the Special Master appointed by the Court; the Court having studied and heard arguments on the final report of the Special Master and the exceptions filed by the State parties; and the Court having issued its Opinion on all issues announced in _____ S. Ct. _____ (199), IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The State of New Jersey's prayer that she be declared to be sovereign over the landfilled portions of Ellis Island added by the federal government after 1834 is granted and the State of New York is enjoined from enforcing her laws or asserting sovereignty over the portions of Ellis Island that lie within the State of New Jersey's sovereign boundary as set forth in paragraph 3 below.

2. The sovereign boundary between the State of New Jersey and the State of New York is as set forth in Article

First of the Compact of 1834, put into law in both States and approved by Congress.

3. The State of New York remains sovereign under Article Second of the Compact of 1834 and by concession of the State of New Jersey to the original Ellis Island as it was structured in 1834 to the low-water mark as more particularly described in the 1857 Map. The boundary between the two States on Ellis Island lies along the line described as follows:

[TO BE SUPPLIED FOLLOWING SURVEYS]

4. The Court retains jurisdiction at the foot of this Decree to entertain such further proceedings, enter such orders and issue such writs as may from time to time be considered necessary or desirable to give proper force and effect to this Decree or to effectuate the rights of the parties.

5. The States of New Jersey and New York shall share equally in the costs of this litigation, in the fees paid to the Special Master and his staff, and in costs and fees associated with a metes and bounds survey of the interstate boundary on Ellis Island.





APPEAL NO. 232101399A

APPENDIX A
COMPACT OF 1834

Act of June 28, 1834, 4 Stat. 708 (1834)

CHAP. CXXVI.—*An Act giving the consent of Congress to an agreement or compact entered into between the state of New York and the state of New Jersey, respecting the territorial limits and jurisdiction of said states.*^(b)

WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of

^(b) The decisions of the Supreme Court upon the compacts between states have been:—

The compact of 1789, between Virginia and Kentucky, was valid under that provision of the constitution which declares, that "no state shall, without the consent of Congress, enter into agreement or compact with another state, or with a foreign power:" no particular mode, in which that consent must be given, having been prescribed by the constitution; and Congress having consented to the admission of Kentucky into the Union, as a sovereign state, upon the conditions in the compact. *Green v. Biddle*, 8 Wheat. 1; 5 Cond. Rep. 369.

The compact is not invalid upon the ground of its surrendering rights of sovereignty, which are inalienable. *Ibid.*

To bring a case within the protection of the seventh article in the compact between Virginia and Kentucky, it must be shown that the title to the land asserted, is derived from the laws of Virginia, prior to the separation of the two states. *Lessee of Fisher v. Cockerell*, 5 Peters, 247.

The construction of a compact between the states of Virginia and Pennsylvania, is not to be settled by the laws or decisions of either of those states, but by the compact itself. *Marlatt v. Silk et al.*, 11 Peters, 1.

The decision of a question of the construction of such a compact, is not to be attested from the decisions of either state, but is one of an international character. *Ibid.*

It is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries

agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:

between the respective limits; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the real boundaries. This right is expressly recognised to exist in the states of the Union, by the constitution of the United States; and is guarded in its exercise by a single limitation or restriction, only, requiring the consent of Congress. *Ibid.*

The compact between New Jersey and Pennsylvania, recognises the right of fishery in riparian owners on the Delaware. *Bennet v. Boggs*, Baldwin's C. C. R. 60.

The plaintiffs, in the circuit court of West Tennessee, instituted an ejectment for a tract of land held under a Virginia military land warrant, situate south of a line called Mathews' line, and south of Walker's line; the latter being the established boundaries between the states of Kentucky and Tennessee, as fixed by a compact between those states, made in 1820; by which compact, although the jurisdiction over the territory to the south of Walker's line, was acknowledged to belong to Tennessee, the titles to lands held under Virginia military land warrants, &c.; and grants from Kentucky, as far south as "Mathews' line," were declared to be confirmed: the state of Kentucky having, before the compact, claimed the right to the soil, as well as the jurisdiction over the territory, and having granted lands in the same. The compact of 1820 was confirmed by Congress. The defendants in the ejectment claimed the lands under titles emanating from the state of North Carolina, in 1786, 1794, 1795; before the formation of the state of Tennessee; and grants from the state of Tennessee, in 1809, 1811, 1812, 1814, in which the lands claimed by the defendants were situated, according to the boundary of the state of Tennessee, declared and established at a time when the state of Tennessee became one of the states of the United States. The circuit court instructed the jury that the state of Tennessee, by sanctioning the compact, admitted, in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted; and that, consequently, the titles are subject to the compact: Held, by the Supreme Court, that the instructions of the circuit court were entirely correct. *Poole v. Fleeger*, 11 Peters, 185.

The seventh article of the compact between Virginia and Kentucky declares "all private rights and interests of lands within the

Agreement made and entered into by and between
Benjamin F. Butler, Peter Augustus Jay and Henry

said district (Kentucky,) derived from the laws of Virginia, prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state (Virginia)." Whatever course of legislation, by Kentucky, would be sanctioned by the principles and practice of Virginia, should be regarded as an unaffected compliance with the compact. Such are all reasonable quieting statutes. *Hawkins v. Barney's Lessee*, 5 Peters, 457.

From as early a date as the year 1705, Virginia has never been without an act of limitation; and no class of laws is more universally sanctioned by the practice of nations, and the consent of mankind, than those laws which give peace and confidence to the actual possessor and tiller of the soil. Such laws have frequently passed in review before the Supreme Court; and occasions have occurred in which they have been particularly noticed, as laws not to be impeached on the ground of violating private rights. It is impossible to take any reasonable exception to the course of legislation pursued by Kentucky on this subject. She has in fact literally complied with the compact in its most rigid construction. For she adopted the very statute of Virginia in the first instance, and literally gave her citizens the full benefit of twenty years to prosecute their suits, before she enacted the law now under consideration. As to the exceptions and provisoes, and savings in such statutes, they must necessarily be left, in all cases, to the wisdom or discretion of the legislative power. *Ibid.*

It is not to be questioned, that laws limiting the time of bringing suits constitute a part of the *lex fori* of every country; the laws for administering justice, one of the most sacred and important of sovereign rights and duties, and a restriction upon which must materially affect both legislative and judicial independence. It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing the limitation act were adopted, to assign her a position higher than that of a dependent on Virginia. *Ibid.*

The limitation act of the state of Kentucky, commonly known by the epithet of "the seven years law," does not violate the compact between the state of Virginia and the state of Kentucky. *Ibid.*

Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance ~~of~~ an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18th, 1833, of the one part; and Theodore Frelinghuysen, James Parker, and Lucius Q. C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

ARTICLE SECOND. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, *Provided*, That the navigation be not obstructed or hindered.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over the waters of the sound from the westernmost end of Shooter's Island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan bay lying westward of a line drawn from the

lighthouse at Prince's bay to the mouth of Mattavan creek; subject to the following rights of property and of jurisdiction of the state of New York, that is to say:

1. The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New Jersey, which now exist or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and the middle of the said waters: *Provided*, That the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH. Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offence committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid; or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof; may be served upon any of the said waters within the exclusive jurisdiction of the state of New York, unless such person or property shall be on board a vessel aground upon, or fastened to, the shore of

the state of New York, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this sixteenth day of September, in the year of our Lord one thousand eight hundred and thirty-three

and of the independence of the United States the fifty-eighth.

B. F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR,
THEO. FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q. C. ELMER.

And whereas the said agreement has been confirmed by the legislatures of the said states of New York and New Jersey, respectively,—therefore,

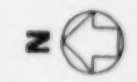
Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, *Provided,* That nothing therein contained shall be construed to impair or in any manner effect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

APPROVED, June 28, 1834.





REGION
LIBERTY ISLAND / ELLIS ISLAND
STATUE OF LIBERTY NATIONAL MONUMENT
NEW YORK / NEW JERSEY



THE COMPACT OF 1834

The Five (5) Meanings of Boundary



40-11

MAP
OF THE BOUNDARY LINE BETWEEN
STATES NEW YORK NEW JERSEY

IN LANDS UNDER WATER IN KILL VON KULL AND NEW YORK BAY

From the Rakover and Chin Bridge in Arthur Kill near Elizabethport, New Jersey
to the Hudson River opposite the Battery, New York City

Agreed upon by the Commissioners appointed by the Governors of said respective States on December twenty third 1882

New York Commissioners

W. H. HAZELTINE

ROBERT MOORE

G. C. MOORE

This showing the agreed upon line to the water of the
boundary of the State of New York

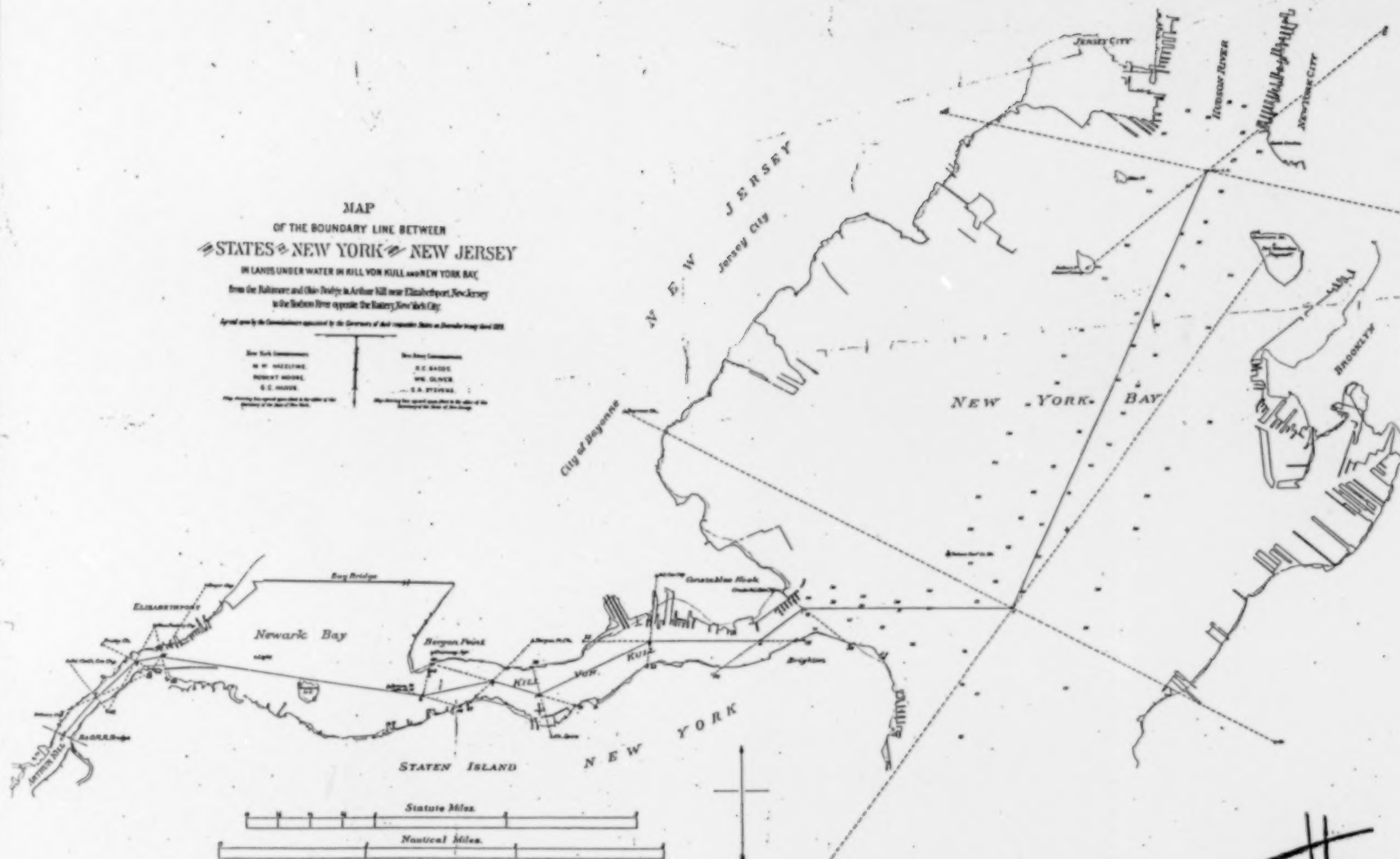
New Jersey Commissioners

G. C. BACON

WM. OLIVER

G. A. PETERSON

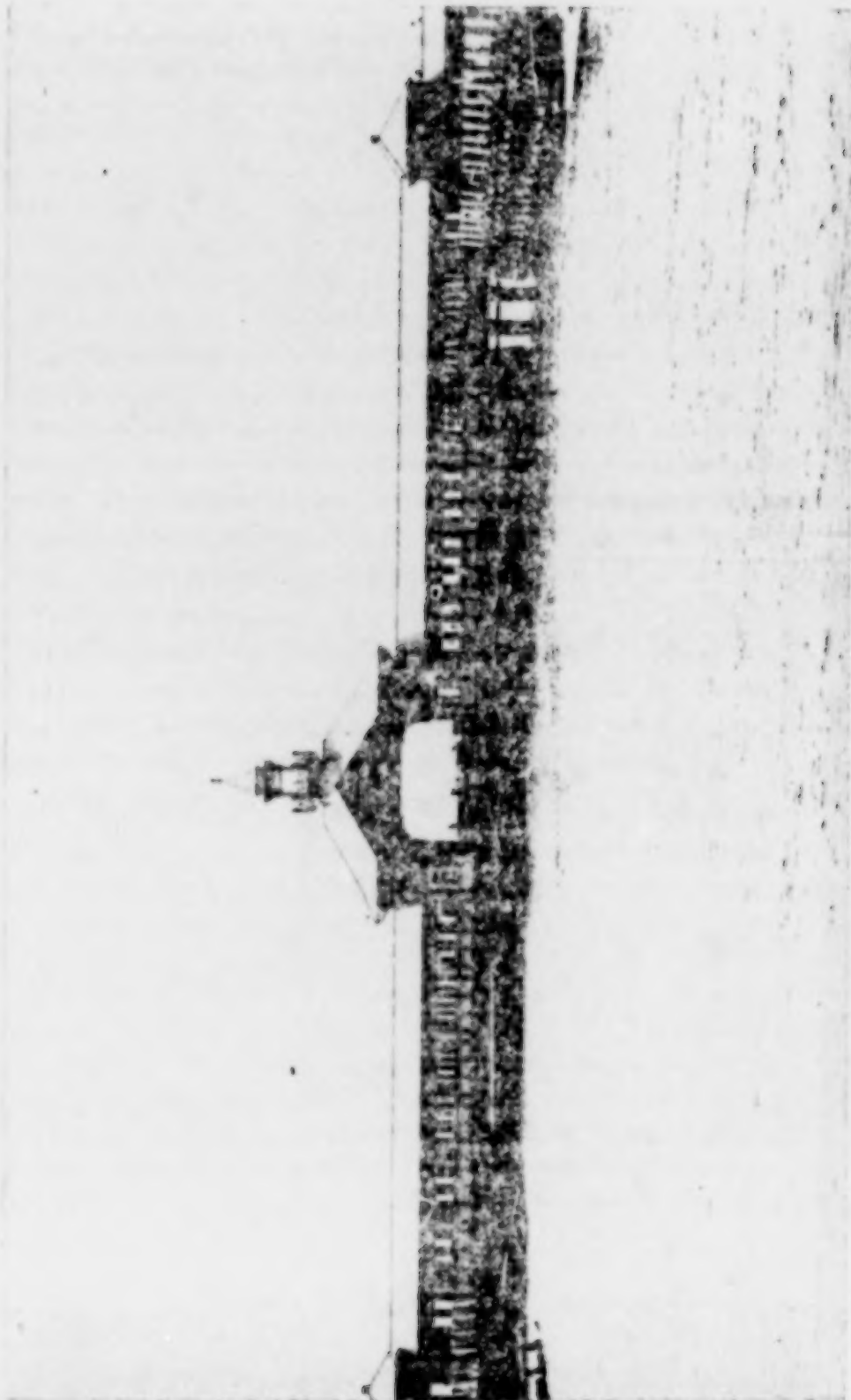
This showing the agreed upon line to the water of the
boundary of the State of New Jersey

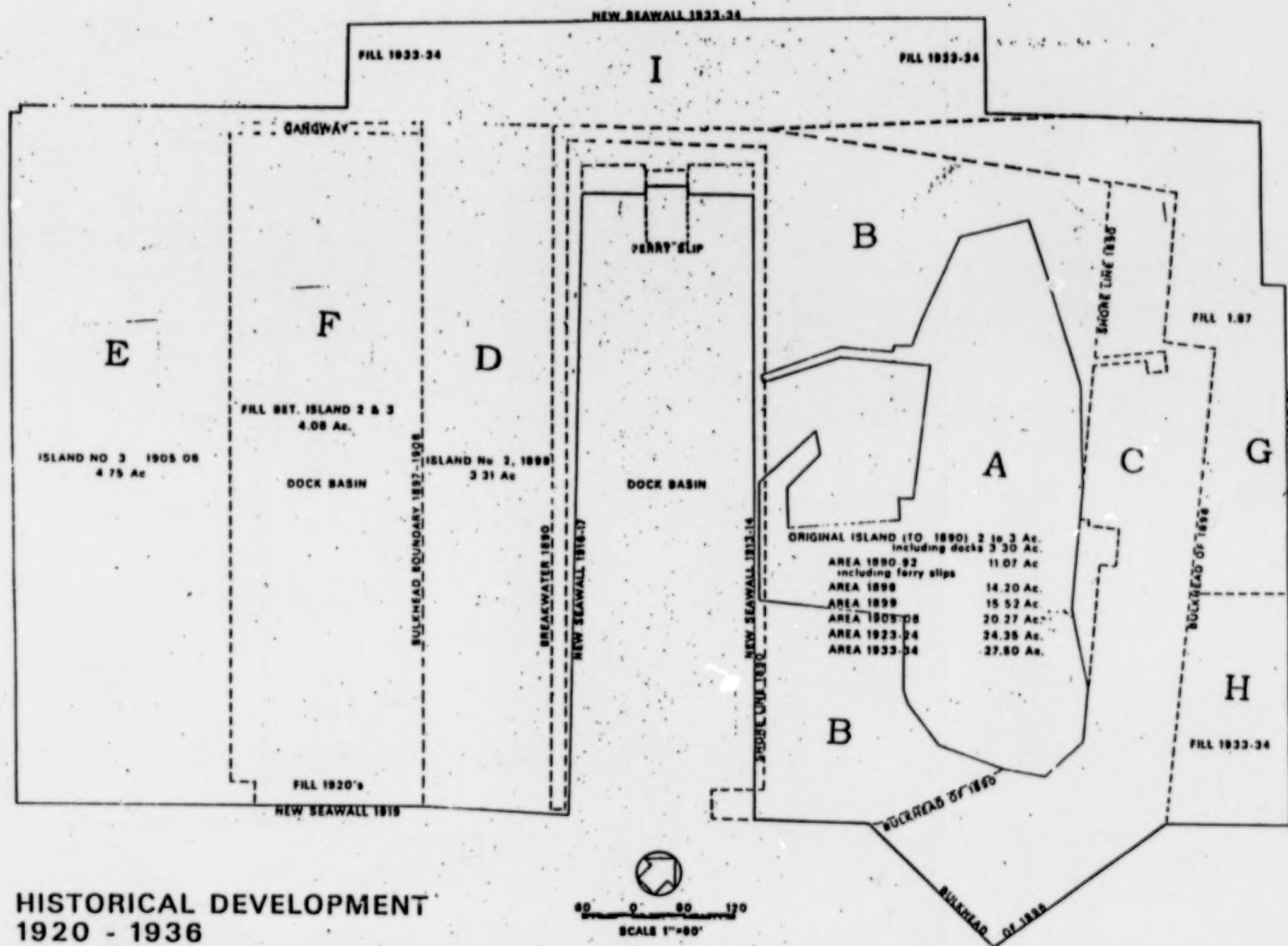


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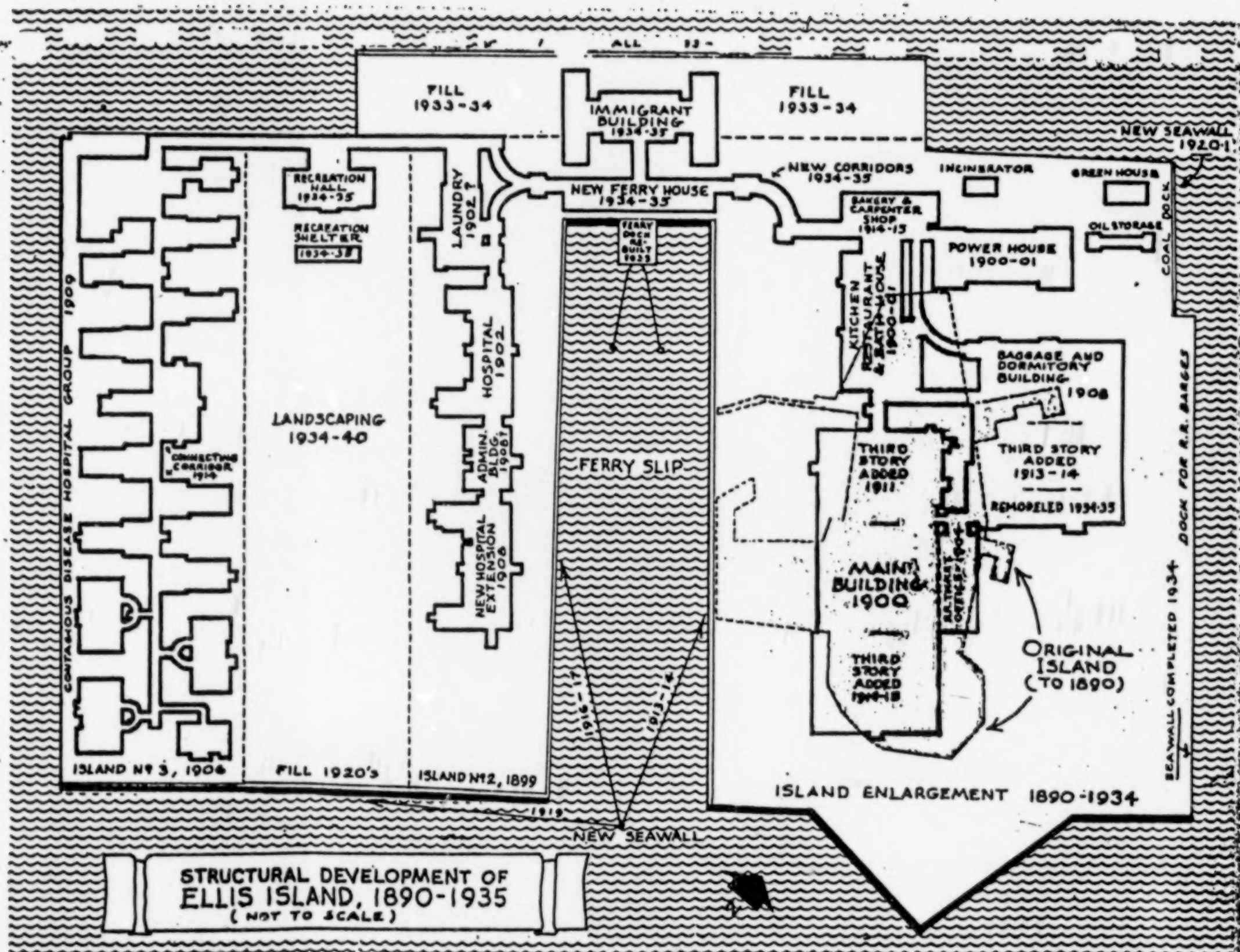
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APPENDIX E





**HISTORICAL DEVELOPMENT
1920 - 1936
ELLIS ISLAND
STATUE OF LIBERTY NATIONAL MONUMENT
NEW YORK / NEW JERSEY**



ON MICROFILM

HISTORIC BASE MAP

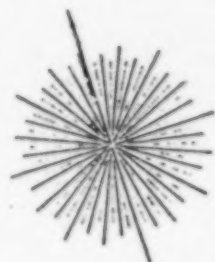
JERSEY CITY

NEW JERSEY CENTRAL RAIL ROAD CO'S DOCKS

HUDSON RIV.

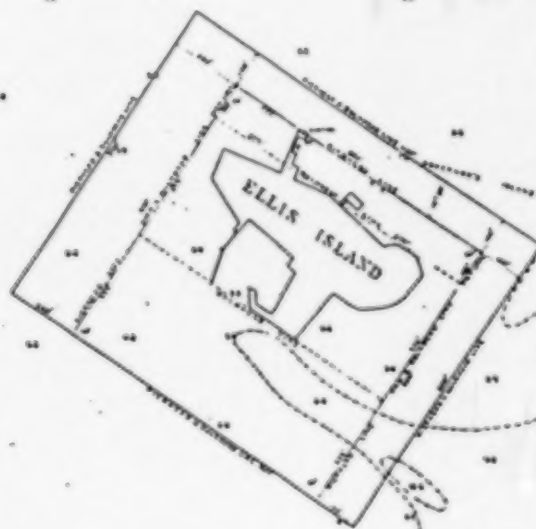
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APPENDIX G



The accompanying report to the Chief of Engineers, U.S.A.,
Washington, D.C., dated New York, June 11, 1890.
The location lines shown on this plan are not, as those
recommended by the New York Harbor Line Board for adoption.

Henry L. Abbott
Chas. E. Brown, Jr., Esq.
Wm. H. Craig
Alfred C. C. C. C.
C. M. Condit
Edw. J. Condit
S. C. Condit
Sec. of Eng'rs
A. H. Higgins
Washington

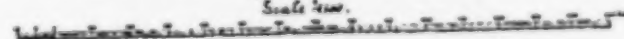


Pierhead and Bulkhead Lines
for
Ellis Island, New Jersey,
New York Harbor
as recommended by the
New York Harbor Line Board

appointed
for the establishment of the Harbor Lines of New York Harbor and its adjacent
waters by Special Order No. 48, Chief of Engineers, U.S.A., Washington, D.C.,
Oct. 1, 1888, in accordance with Section 14, Act of August 8, 1888.

- June 1890 -

Scale 1/2 in.



War Department
July 9, 1890.

Benjamin Root
Secretary of War

War Department
Relate, D.C., 1890.

The modifications in the Pierhead and Bulkhead
Lines shown on this plan are approved.

Samuel H. Kneass
Secretary of War

104 201.8



APPENDIX H

MEMORANDUM OF UNDERSTANDING

IN REGARD TO ESTABLISHING A BI-STATE
PUBLIC CORPORATION TO BE KNOWN AS THE
STATUE OF LIBERTY TRUST FUND*ARTICLE I*

Liberty and Ellis Islands are national treasures symbolizing our nation as a land of hope for people yearning for freedom, justice, equality of opportunity and a better life.

The Statue of Liberty was the first sight of thousands of immigrants to the United States. The view of the Statue standing in the harbor symbolized the start of a new life with greater opportunities and challenges in this country. Ellis Island was the soil on which these immigrants first stepped in their new world.

There is now pending a lawsuit that seeks to determine the respective sovereignty and jurisdiction of the States of New Jersey and New York over Liberty and Ellis Islands. In view of the special subject matter involved, it is fitting that such conflicts be avoided by dedicating the economic benefits of sovereignty and jurisdiction over the Islands to a regional purpose related to the symbolic meaning of the Statue of Liberty and Ellis Island. However, since these Islands have long been under effective federal title, they can truly be said to belong to all of the people of the United States.

Today, the homeless population of the States of New York and New Jersey is a reminder that there are still many in this region for whom hopes of a better life remain unfulfilled. It is appropriate, in this centennial year of the Statue of Liberty, that Ellis and Liberty Islands, the

nation's monuments to the vast numbers of people who came from other countries seeking a better life, be rededicated to the assistance of our homeless population.

Homelessness is a regional problem that demands regional solutions. Because of the ease of access to interstate transportation and the very nature of their transient existence, the homeless now travel back and forth across state borders quickly and easily. It is therefore appropriate that the States of New Jersey and New York work cooperatively to develop and promote programs to assist homeless men, women and children in both states in obtaining decent and affordable shelter.

ARTICLE II

The Governors of the States of New York and New Jersey hereby agree to use their best efforts to secure enactment of identical legislation in their respective states which shall establish a bi-state public corporation to be known as the "Statue of Liberty Trust Fund" (hereinafter "the Fund").

The Fund shall be managed by an eleven member board of directors, five to be appointed by the Governor of the State of New York and five to be appointed by the Governor of the State of New Jersey, and one director, who shall be designated the chairperson of the board, to be appointed by the Governors jointly. All board members shall serve without compensation, but shall be entitled to reimbursement of their actual and necessary expenses incurred in the performance of their duties. The term of office of each member shall be five years and each member shall hold office until his successor shall have been appointed.

No action of the board of directors of the Fund shall be binding unless taken at a meeting at which at least three of the members from each state are present and vote

in favor thereof. The board of directors of the Fund shall annually submit a plan for the expenditure of the resources of the Fund which shall only become effective upon the approval of both Governors.

ARTICLE III

The purpose of the Fund shall be to provide aid to homeless persons within the States of New Jersey and New York. The Fund shall accomplish this objective primarily by entering into contracts with or making grants to local social services districts or to other public or private entities in each state which aid homeless persons, pursuant to such criteria as each state shall provide. For the purposes of this agreement, "homeless persons" shall mean undomiciled persons who are unable to secure adequate, permanent and stable housing in the States of New York and New Jersey without special assistance. The Fund shall coordinate with social service organizations of both states to ensure that resources are provided to the most cost-effective programs for the homeless and are used to address the most pressing needs in this regard. Resources of the Fund shall be provided to appropriate agencies and other organizations from each state on an equal basis.

ARTICLE IV

The Governors of New York and New Jersey agree that it is appropriate that the States of New York and New Jersey each appropriate annually to the Fund upon its establishment, through the states' respective budgets, the amounts described in this article to effectuate the intent of this agreement.

Such annual appropriation by each state shall be in an amount equal to the amount, as determined in the manner hereafter described, set forth in the certificate of

its tax administrator as the total of a) all state and local tax revenues collected by that state and its localities, after deducting administrative costs, from the taxes hereafter set forth during the prior calendar year which are attributable directly to Ellis and Liberty Islands and b) the amount collected by that state and its localities, and one-half of the amount collected by joint agencies thereof, from the fees hereafter described during the same period. Such state and local taxes which shall be taken into account for the purpose of such annual appropriation are the following taxes presently or hereafter imposed by the respective states and their localities: franchise, or business privilege or like taxes on the doing of business; taxes imposed on the earnings or income of business entities (including corporations) or individuals; and sales and compensating use taxes. The fees which shall be taken into account for the purpose of such appropriation are those fees now or hereafter collected by either state or its localities, and one-half of the amount collected by joint agencies thereof, for the provision of public access to or from Ellis or Liberty Islands. The tax administrator of each state shall, for the purpose of fixing the required amount of the annual appropriation to the Fund, certify to the legislature of his state and the Fund a) his estimate of the amount, less costs of administration, of the state and local revenues collected during the prior calendar year from the aforesated taxes which are attributable directly to the Islands, and b) the appropriate amount of such fees collected during such period, and the appropriations to be made by each state shall be equal to the total set forth in such certification of its tax administrator. The two states shall prescribe uniform procedures and methods to be employed by the tax administrators in making the estimation of such state and local tax revenues required to be included in such certification and such other uniform procedures as may be necessary to effectuate the terms of this agreement.

For the purpose of determining revenue attribution of the above enumerated state and local taxes to Ellis or Liberty Islands the following shall apply:

1. Traditional revenue attribution. For the purposes of determining revenue attribution, if any, of any particular such state or local tax to Ellis or Liberty Island, the same method or concept with respect to allocation or attribution which is used for the purpose of determining allocation to the state or locality with respect to that particular tax as administered by the state (or locality) imposing such tax shall be applied in making the determination with respect to the Islands. In the case of sales and compensating use taxes, if the tax is occasioned by an event occurring on the Islands, the tax revenues derived therefrom shall be allocable to the Islands.

2. Other Revenue Attribution. In addition to the foregoing attribution of such state and local taxes by the method set forth in paragraph 1 above, to the extent not already included under such paragraph, the revenues collected from the following such taxes, to the extent presently or hereafter imposed by the states and their localities, shall, for the purposes of this article, be attributable directly to the Islands:

- a) State and local sales and compensating use taxes imposed with respect to (1) the provision of water, sewerage, gas, electricity, telephone or like utilities or utility services where such utilities or utility services are used or consumed on Ellis or Liberty Islands, irrespective of the facts that the delivery of such utilities or utility service occurs off the Islands, (2) the building of or the provision of access to or from Ellis or Liberty Islands, (3) the provision of sightseeing tours to, of or around Ellis and/or Liberty Islands or transportation to or from the Islands, irrespective

of the fact that such tour or transportation was purchased off the Islands, (4) sales of food and beverage and other tangible personal property by providers of such sightseeing tours to their patrons or by the providers of such transportation to their passengers, (5) fuel and all other tangible personal property purchased by providers of such tours or transportation and used directly in connection with the provision of such tours or transportation. Where such sightseeing tour or transportation includes other sites or destinations, such taxes shall be apportioned;

- b) State and local sales tax imposed by either state or its localities with respect to the purchase of tangible personal property, services or other items which are used or consumed on Ellis or Liberty Islands by persons residing thereon or in connection with a trade or business conducted thereon if with respect to such use or consumption there is due and owing state and local compensating use tax;
- c) State and local franchise, or business privilege or like taxes on the doing of business or taxes imposed on the earnings or income of business entities (including corporations), in the case of business activities conducted in either state which consists of (1) providing water, sewerage, gas, electricity, telephone or like utilities or utility services where such utilities or such utility services are used or consumed on Ellis or Liberty Islands, (2) the building of or the provision of access to or from Ellis or Liberty Islands, (3) conducting tours to, of or around Ellis and/or Liberty Islands or providing transportation to or from the Islands. The portion of such state and local taxes derived from such business activities

shall be attributable directly to Ellis and Liberty Islands;

- d) (1) Personal income taxes imposed by the states and their localities on other than persons residing on Ellis and Liberty Islands (i) personal income taxes imposed by the State of New York and its localities with respect to residents of the State of New York and its localities and (ii) personal income taxes imposed by the State of New Jersey and its localities with respect to residents of the State of New Jersey and its localities, in the case of income or wages from employment or earnings from self-employment of such residents derived from employment or self-employment (A) on Ellis or Liberty Islands, and (B) with respect to the building of or the provision of access to or from such Islands or the conducting of tours to, of or around Ellis and/or Liberty Islands or the provision of transportation to or from such Islands, the portion of such state and local taxes derived from such income or wages or earnings shall be attributable directly to Ellis and Liberty Islands and (2) nonresident personal income and earnings taxes imposed by either state and its localities with respect to persons residing on Ellis and Liberty Islands, in the case of such persons paying such taxes to either state and its localities, the taxes so paid by such persons shall be attributable directly to Ellis and Liberty Islands.

/s/ Mario M. Cuomo
MARIO M. CUOMO
Governor
State of New York

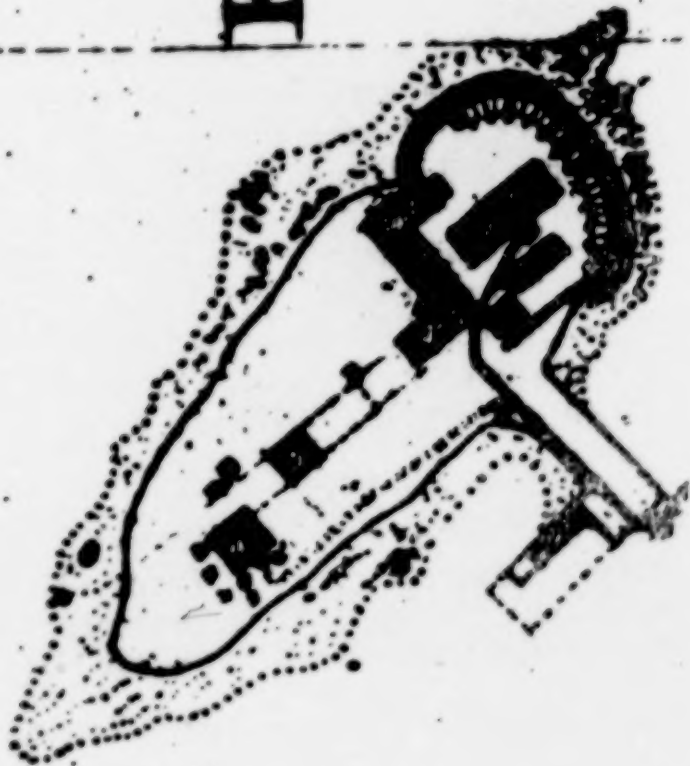
Date: *June 23, 1986*

/s/ Thomas H. Kean
THOMAS H. KEAN
Governor
State of New Jersey

Date: *June 23, 1986*

APPENDIX I

Ellis' Island





Drawer 38.
Sheet 5.

New York

Ellis's Island
Fort Gibson

ENGINEER
U. STATES
TOP. BUREAU

A copy sent to Belmont.
Delivered with letter of
9 January 1868

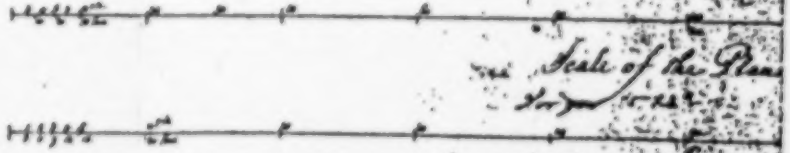
By order of the
Major General
The date

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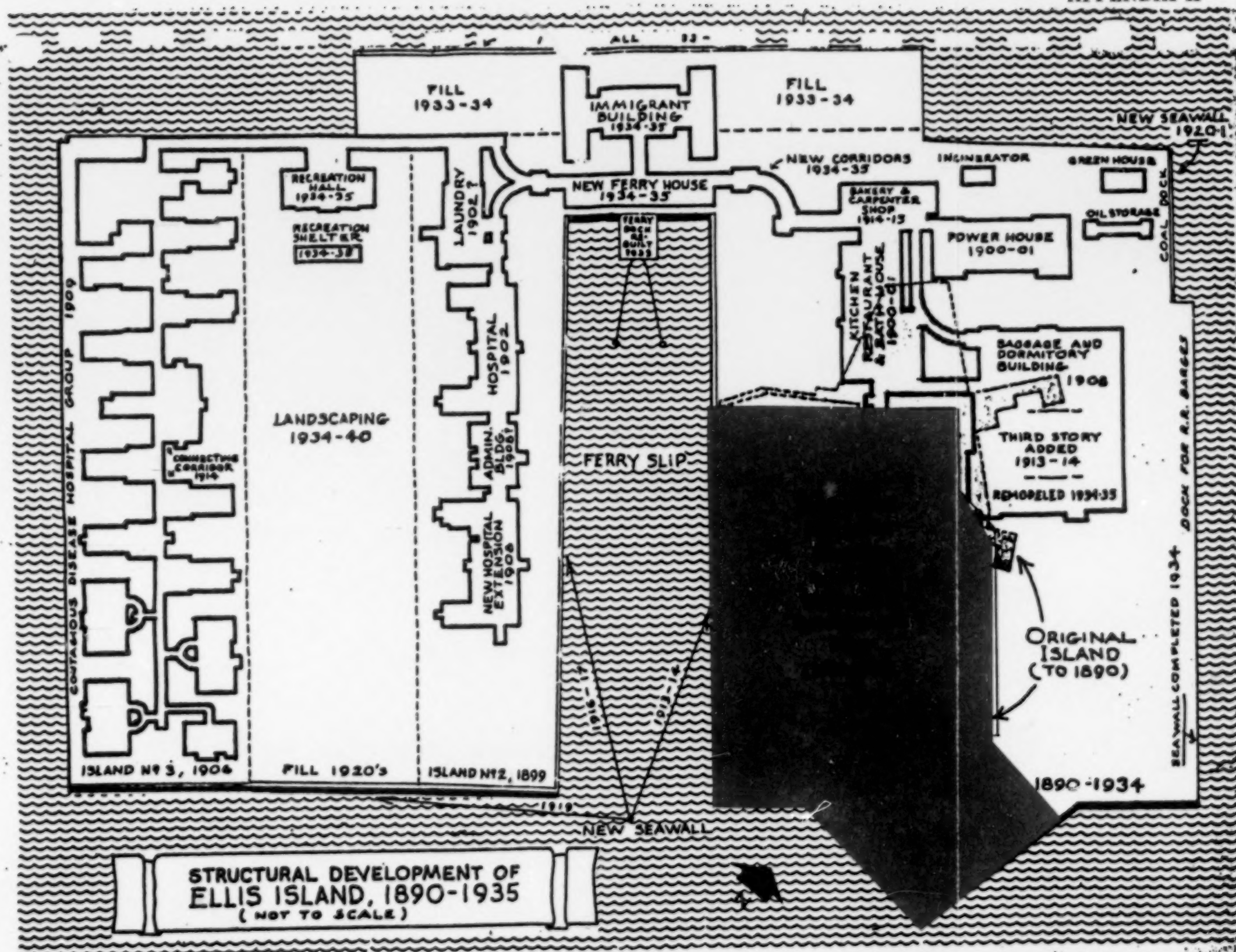


Drawn by Capt
Pomeroy
1868



38-5

Scale of the Plan
Feet 0 100 200 300 400 500
Miles 0 1 2 3 4 5



ON MICROFILM

HISTORIC BASE MAP

356 / 20.001

MP-ELIS-2

BEST AVAILABLE COPY

No. 120, Original

Supreme Court, U. S.

FILED

AUG 20 1997

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

**RESPONSE OF PROPOSED PRESERVATION
AMICI TO OBJECTIONS OF THE STATE OF
NEW JERSEY TO MOTION FOR LEAVE TO
FILE BRIEF AS *AMICI CURIAE***

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**RESPONSE OF PROPOSED PRESERVATION AMICI TO
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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

The National Trust for Historic Preservation in the United States and the Municipal Art Society of New York (proposed "Preservation Amici") respectfully respond to the Objections of the State of New Jersey to Preservation Amici's motion for leave to file a brief as *amici curiae* in support of the Exceptions of the State of New York in this case. Proposed Amici seek to file a brief as *amici curiae* (the "Preservation Brief") in order to "offer a distinct perspective on the landmark preservation issues raised in this case." Motion for Leave at 1. New Jersey, however, now contends that leave should be denied because (1) the premise on which the proposed Preservation Brief is based is "pure fantasy" and (2) the Brief would "add little, if any, meaningful legal analysis to the issues to be addressed by the Court." Objection at 5-6. New Jersey is wrong, both as a matter of law and fact, for the following reasons: (1) the premise on which the Preservation Brief is based is the same premise on which this Court accepted

jurisdiction of this case, (2) the record contains evidence substantiating the possibility that the Federal Government might someday relinquish control of all or part of Ellis Island, and, in any event, is likely to enter into a long term lease to permit development on the south end of the Island; and (3) the significance of historic preservation issues has previously been acknowledged by both the Special Master and this Court.

A CASE OR CONTROVERSY EXISTS

New Jersey's claim that the Preservation Amici's arguments are based on a "speculative scenario" that will never come to pass fails as a matter of law because this Court has already decided that the very same "speculative scenario" presents a case or controversy that is ripe for adjudication. When New Jersey originally filed its motion seeking leave to file a complaint in April 1993, both New York and the United States opposed granting the motion on the ground that the dispute between New York and New Jersey did not present a "serious current controversy" that was "concrete" enough to warrant exercise of this Court's original jurisdiction. (R. at 14-16.) By accepting jurisdiction on May 16, 1994, this Court found otherwise, and, in so doing, necessarily concluded that a set of circumstances could arise where the laws of New York and New Jersey could come into conflict on Ellis Island—an area now under exclusive federal jurisdiction where the laws of neither State apply directly.

It is this same set of circumstances—which New Jersey attacks as involving an "exceedingly unlikely hypothetical"—that provides the point of departure for the arguments advanced by the Preservation Amici in their proposed Brief. The Preservation Amici will certainly advocate vigorously to prevent such a scenario from ever becoming a reality. The National Park Service currently exercises exclusive jurisdiction over Ellis Island, and, so long as

that remains the case, the Island's historic sites and buildings will receive protection under a single and responsible preservation program, as required by federal law. However, since this Court has acknowledged the possibility that exclusive federal jurisdiction may eventually be relinquished, and the Special Master has drawn his proposed boundary with an eye to the laws of both States applying to Ellis Island, Proposed Amici should be allowed to file an amicus brief arguing that the Report's "split sovereignty" remedy would place the integrity of Ellis Island's historic character in jeopardy.

THE RECORD SUPPORTS PRESERVATION AMICI'S ARGUMENTS

New Jersey's claim that the Preservation Amici's "predictions are entirely without support in the record" is utterly untrue. Objection at 8. Both testimony at trial and documents submitted by the Preservation Amici¹ in connection with summary judgment and post-trial briefing (which are clearly part of the "record" in this original case)² demonstrate that the possibility of the Federal Government eventually relinquishing its control over all or part of Ellis Island is real. Indeed, counsel for New Jersey himself conceded at trial that "periodically . . . the Parks Service looks at proposals which . . . could open the door to substantial private action and activities on the island, again opening the door to exercise of [State] sovereignty in a more tangible way." (Tr. at 63 (Opening Statement of Joseph L. Yannotti); see Appendix to Post-Trial

¹ Amici participated in the proceedings before the Special Master in an amicus group that also included the New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council. These latter organizations have filed a separate Amicus Brief in support of the Exceptions of the State of New York, in which the National Trust and the Municipal Art Society elected not to join because of a continuing desire to bring to the Court's attention the "impracticality" of the "split sovereignty" remedy recommended by the Report.

² New Jersey's contention that the record in this original case is limited to evidence offered by the parties is belied by the fact that the Court has many times "rel[ied] on factual information, cases or analytical approaches provided only by an amicus." Robert L. Stern, *et al.*, *Supreme Court Practice* 564 (1993); see, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Turner v. Safley*, 482 U.S. 78, 93, 95 (1987); *Maryland v. Craig*, 497 U.S. 836, 855-58 (1990); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 589 n.3 (1986) (Stevens, J., dissenting).

Brief of Preservation Amici (Docket No. 368) (collecting press reports concerning proposed private development efforts on Ellis Island from 1954 to 1995)). The reality of this threat was driven forcefully home days after the Special Master's Report was issued when New Jersey officials were reported in the press to be hopeful that the Report's recommendations would rekindle private development plans for Ellis Island. *For Ellis Island, New Talk of a Hotel, a Bridge, and Masses Yearning to Get in Free*, NEW YORK TIMES, Apr. 3, 1997. In light of such evidence, New Jersey's contention that nothing in the record supports the Preservation Amici's concerns is simply unfounded.

**HISTORIC PRESERVATION CONCERNS
SHOULD BE ADDRESSED IN THIS CASE**

What is most disingenuous about New Jersey's Objection is its refusal to acknowledge that historic preservation concerns have been, and should continue to be, addressed in this original case. When New Jersey opposed the participation of the Preservation Amici (as then constituted) at both the summary judgment and post-trial phases of the proceedings (Docket Nos. 269 and 338), the Special Master overruled New Jersey's objections on both occasions, indicating that historic preservation concerns *should* play a part in the resolution of this interstate boundary dispute. (See Interim Order (Docket No. 286) at 8 n.36.)

Moreover, the participation of the original Preservation Amici had a substantial effect on the Report's recommendations. The "equitable reconstitution" recommended by the Special Master appears to have been largely provoked by the Preservation Amici's arguments concerning the impracticality of any "split jurisdiction" remedy. (R. at 162-66). Indeed, the Special Master, adopting, in part, the Amici's reasoning, held out the hope that the proposed reconfiguration of the "original island" would "retain the historic connection between the Main

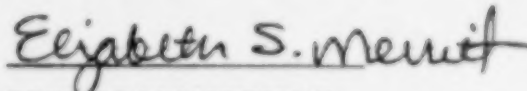
Building—the immigration locus—on the original island and the City of New York.” (R. at 166.) Proposed Amici contend that the Special Master did not go far enough to protect the historic preservation interests he thus recognized, but, in light of this record, it is difficult to understand how New Jersey can now argue such historic preservation concerns should play no role in this case.

Those issues should be particularly relevant in a proceeding before this Court, which long ago acknowledged the importance of historic preservation issues, in a case upholding the validity of New York City's preservation laws. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). It should do the same here. While this case turns primarily on the interpretation of a compact between two States, historic preservation considerations must play a part because its resolution requires more than drawing a line down the middle of a desolate and uninhabited stretch of river or lake. It potentially involves drawing a line through an ensemble of buildings that forms the core of an island that is etched into the memories of millions of immigrants and their descendants as the Gateway to America. (R. at 33 (“Few controversies ever to come before the Supreme Court have a stronger hold on our history and traditions.”).) The parties have not addressed this important issue in their Briefs, but Amici are ready and willing to furnish the Court with an informed assessment of how the outcome recommended by the Report would affect the preservation future of Ellis Island. Leave should be granted to allow them to do so.

WHEREFORE, Proposed Amici respectfully request that the Objections of the State of New Jersey be overruled and leave be granted to Amici to file the Preservation Brief.

Dated: Washington, D.C.
August 20, 1997

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**RESPONSE OF PROPOSED HISTORIAN
AMICI TO OBJECTIONS OF THE STATE OF
NEW JERSEY TO MOTION FOR LEAVE TO
FILE BRIEF AS *AMICI CURIAE***

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The New-York Historical Society, the Society for New York City History, Professor Arthur M. Schlesinger, Jr., Professor Richard C. Wade, and Professor Kenneth T. Jackson (collectively, "Proposed Historian Amici") respectfully respond to the Objections of the State of New Jersey to their Motion for leave to file a brief as *amici curiae* in support of the Exceptions of the State of New York in this case.¹ New Jersey attacks the Historian Amici Brief because (1) it urges the Court "to take whatever measures it deems necessary to ensure that the record is complete" before deciding this case and (2) it seeks to put before the Court relevant facts that were "either overlooked or ignored" by both States and the Special Master. Objections at 2. New Jersey's attempt to have leave denied for filing the Historian Brief on these grounds

¹ New Jersey's contrary insinuations notwithstanding and as previously certified pursuant to Supreme Court Rule 37.6, the Historian Brief is the work product solely of the Proposed Amici and their counsel. New York played no part in determining the approach, scope or conclusions of the Brief, and New Jersey's unsupported allegations to the contrary are unwarranted, unfounded, and untrue.

must fail because New Jersey: (1) understates the role and responsibilities of this Court in original cases, (2) misconstrues the role of *amici curiae* in proceedings before this Court, and especially in original cases, and (3) mischaracterizes the stated intent and actual objective of the proposed Historian Brief.

THE COURT'S ROLE IN ORIGINAL CASES

New Jersey's attack on the Historian Brief appears to be chiefly premised on a myopic view of this Court's role in original cases. New Jersey argues as if the reports filed by the Special Master in this case on March 31 and May 1, 1997 (collectively, the "Report" or "R.") were final determinations of an Article III court, now on appeal to this Court solely on the basis of a definitive (and presumptively closed) appellate record. This is not the case. In original cases, a Special Master's report is merely a recommended ruling which remains subject to full *de novo* review by this Court, which, in turn, retains ultimate responsibility for both findings of fact and conclusions of law. See *United States v. Maine*, 475 U.S. 89, 97 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); *Mississippi v. Arkansas*, 415 U.S. 289, 294 (1974); *United States v. Texas*, 339 U.S. 707, 715, *modified*, 340 U.S. 848 (1950).

In this context, the "record" is whatever is ultimately before this Court when—after briefing, argument, and any independent inquiries—the Court issues its final decision. It is not, as New Jersey would argue, solely what is put before the Court by the Special Master in an initial report on the merits. To the contrary, this Court has often supplemented the record created by a Special Master of its own accord, see *Colorado v. New Mexico*, 467 U.S. 310, 324 (1984); *Maryland v. Louisiana*, 451 U.S. 725, 759-60 (1981), or remanded a case for additional fact-finding on issues overlooked by a Special Master. See *Delaware v. New York*, 507 U.S. 490, 510

(1993); *Texas v. New Mexico*, 482 U.S. 124, 135 (1987); *Colorado v. New Mexico*, 467 U.S. 310, 314 (1984); *Idaho v. Oregon*, 444 U.S. 380, 393 (1980); *Pennsylvania v. New York*, 407 U.S. 206, 215 (1972).

The Court has gone to such lengths because, as even the Special Master acknowledges, "in original jurisdiction cases, full and liberal factual development is important because of the lofty historical, territorial, and financial implications of these cases to the states involved." (R. at 24 citing *United States v. Texas*, 339 U.S. 707, 715 (1950)). There can be little doubt that the future of Ellis Island raises such "lofty" implications, so it is reasonable to assume, as have the Historian Amici, that the Court will wish to exhaust all viable avenues of inquiry before deciding this case. (R. at 33 ("Few controversies ever to come before the Supreme Court have a stronger hold on our history and traditions."))

It is in this context that the Historian Amici urge the Court "to take whatever measures it deems necessary to ensure that the record is complete" before deciding this case. And, it is for this reason that the Historian Brief undertakes to present the Court with relevant factual and legal considerations that are not to be found in the Report or the record of proceedings before the Special Master.

ROLE OF AMICI CURIAE

In so doing, the Proposed Historian Amici furnish to this Court precisely the type of "help" that is contemplated by Supreme Court Rule 37, which provides that an amicus brief should "bring to the attention of the Court relevant matter not already brought to its attention by the parties." Supreme Court Rule 37.1. Under this standard, the scope of an amicus brief is not limited to the facts relied upon or the arguments made by the party in whose support the brief is

filed. To the contrary, the Court has many times "rel[ied] on factual information, cases or analytical approaches provided only by an amicus." Robert L. Stern, *et al.*, *Supreme Court Practice* 564 (1993); *see, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Turner v. Safley*, 482 U.S. 78, 93, 95 (1987); *Maryland v. Craig*, 497 U.S. 836, 855-58 (1990); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 589 n.3 (1986) (Stevens, J., dissenting); *Elgin, J. & E. Ry. Co. v. Burley*, 327 U.S. 661, 669-75 (1946) (Frankfurter, J., dissenting). On rare occasions, this Court has even decided cases on a ground "raised only in an amicus brief." *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991); *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961).

The Historian Brief fully satisfies the Rule 37 standard. As New Jersey several times points out, neither New Jersey nor New York had previously brought to the Court's attention the existence of (what New Jersey now concedes to be) the plainly relevant factual information proffered in the Historian Brief. Regardless of how this came to be the case, such information, together with the potential sources for additional information pointed to by the Amici, need to be before this Court in order for it to reach an informed resolution of this dispute. The Historian Brief, if leave is granted for its filing, will ensure that it is.

OBJECTIVE OF HISTORIAN BRIEF

While all of the foregoing suggests that an amicus brief in an original case could play a significant role in the Court's decisionmaking process, the Historian Brief is hardly this ambitious. Its simple objective is twofold—(1) to present the Court with facts that support conclusions as to several significant issues that differ from those in the Report and (2) to point out to the Court that various, relatively obvious avenues of inquiry exist that have not yet been

pursued. New Jersey's contrary contentions notwithstanding, the Historian Brief does not seek to undermine the adversarial process by (a) asking this Court to rely on evidence that New Jersey has not had to opportunity to controvert or (b) seeking a remedy that neither State has requested.

The limited efforts of the Amici in the short time between filing of the Report and the filing of its proposed Brief uncovered several, previously-unexplored sources of relevant information. Much of this information is derived from published sources (the more than 25 books and articles cited in the Brief's Table of Authorities) of which this Court can plainly take judicial notice. Also located, however, was a variety of contemporaneous letters and memoranda that shed new light on the activities, motives and mindsets of the Compact's drafters. Proposed Historian Amici believe that these documents (most of which have been cited in published sources) should be before the Court, but, out of an abundance of caution, Proposed Amici proffered these documents with a clearly-stated caveat: either the Court could take judicial notice of these "historical" documents, as otherwise incontrovertible, and thus consider them for the propositions they support, or "if the Court [was] not so inclined, it [could], at the very least, look to such documents as evidence that avenues of inquiry exist that have not yet been pursued." Brief at 7 n.5. New Jersey's mischaracterization of Proposed Amici's stated intent aside, the Court should look to any "new evidence" in the Historian Brief for what it is—a good faith proffer of information that any reasonable person would have expected to have been dealt with in the Report.

Finally, Proposed Amici do not in any way purport to seek a remedy that neither State has requested. To the contrary, Proposed Amici seek the same remedy sought by the State of New York—the continued exercise by New York of sovereignty over Ellis Island. New York


and the Historian Amici simply propose different routes for the Court to reach this outcome. New York points the Court to the plain meaning of Article II and record evidence of prescription and acquiescence, while the Historian Amici focus on the historical context of Article III. The chief difference between the two approaches is that for purposes of New York's arguments, the record is inarguably complete, whereas for purposes of the Historian Amici's arguments, it may not be. However—New Jersey's contentions to the contrary notwithstanding—whether or not the record is complete is for this Court, and not New Jersey, New York or the Historian Amici, to decide. Hence, Proposed Amici properly urge the Court to take whatever measures are necessary to satisfy itself that all valid avenues of inquiry have been exhausted before finally resolving the factually complex and politically sensitive issues raised by this case.

WHEREFORE, Proposed Historian Amici respectfully request that the Objections of the State of New Jersey be overruled and leave be granted to file the Historian Brief.

Dated: New York, New York
August 20, 1997

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CERTIFICATE OF SERVICE

I hereby certify that the annexed Response of *Amici Curiae* New-York Historical Society, Society for New York City History, Arthur M. Schlesinger, Jr., Richard C. Wade, and Kenneth T. Jackson to Objections of The State of New Jersey to Motion For Leave to File Brief as *Amici Curiae* was served via U.S. Mail on August 20, 1997, upon the following counsel of record:

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No. 120, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

OBJECTIONS OF THE STATE OF NEW JERSEY
TO THE MOTIONS OF AMICI CURIAE FOR
LEAVE TO FILE BRIEFS IN SUPPORT OF THE
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No. 120, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

OBJECTIONS OF THE STATE OF NEW JERSEY
TO THE MOTIONS OF AMICI CURIAE FOR
LEAVE TO FILE BRIEFS IN SUPPORT OF THE
EXCEPTIONS OF THE STATE OF NEW YORK

New Jersey respectfully objects to the motions of three groups of proposed *amici curiae* comprised of three individuals and seven associations for leave to file briefs in support of the exceptions of the State of New York. The proposed *amici* briefs attempt to introduce into the record new evidence in support of New York's position that was either overlooked or ignored by that State during the proceedings below. In addition, the proposed *amici* briefs address legal and factual issues that are wholly irrelevant to the questions to be decided in this appeal. The motions for leave to file *amici* briefs, therefore, should be denied.

The so called "proposed historian *amici*" consist of two historic associations, the New-York Historical Society, and the Society for New York City History, and three history professors,

Arthur M. Schlesinger, Jr., Richard C. Wade, and Kenneth T. Jackson. In their proposed brief in support of New York's exceptions these amici present "expert" opinions concerning the negotiations preceding the 1834 Compact. The proffered opinions rely almost exclusively on evidence that was not entered into the record below by either party and present "a detailed summary of relevant events in the years 1832 through 1834 and brief accounts of the most significant participants in those events." (Proposed Historian Amici Brief at 3). In fact, the proposed amici admit that their brief "cites to a number of letters and documents . . . that were not introduced into evidence at trial" (Proposed Historian Amici Brief at 7, n.5). Because an amici brief is not the proper vehicle for introducing into the record evidence that was available to a party that either overlooked that evidence or decided not to seek its introduction during the fact finding process, the motion of the proposed historian amici for leave to file a brief should be denied.

New York had an opportunity to select expert historians to present testimony and offer evidence in support of that State's position during the hearings in this matter. Indeed, New York produced three such experts, covering all or part of nine days of testimony, and introduced into the record hundreds of pages of historical documents. Having had the lion's share of its expert historians' opinions rejected by the Special Master, New York now tries to bolster its position through the submission of new opinions and new evidence in the thinly disguised veil of the

proposed historian *amici* brief. It is simply too late in the day for New York to resuscitate its historical evidence with new expert opinions and evidence.

The hypotheses of the proposed historian *amici* and the evidence upon which they purport to rely are being proffered to the Court long after the conclusion of the hearings in this matter. New Jersey would be severely prejudiced by the acceptance of the historian *amici*'s brief, as it will have no opportunity to cross-examine the proposed expert historians, to analyze thoroughly the new evidence upon which they rely, or to offer its own expert testimony concerning the new opinions of the proposed *amici*.

Moreover, an *amici* brief cannot serve to introduce scores of historic documents into the record. The proposed *amici* cite dozens of articles, letters, and other materials relating to the individuals who negotiated the 1834 Compact. According to the proposed *amici*, this evidence is available "in publicly accessible state or university collections." (Proposed Historian *Amici* Brief at 7, n.5). Thus, New York had every opportunity to locate this evidence prior to the hearings in this matter and to present testimony regarding these documents in support of its claims. New York either failed to locate this material or made the strategic decision not to seek its introduction into the record. It is entirely inappropriate for this new evidence to be introduced into the record at this late stage in the proceedings through an

amici brief.' While amici might, in limited circumstances, rely on judicially noticeable evidence not introduced by the parties, such evidence "should not relate to the facts of the particular case as between the parties" R. Stern, *Appellate Practice in the United States*, at 306 (2d ed. 1989). The historic evidence relating to the Compact contained in the proposed amici brief directly relates to the factual dispute between the parties. The proposed historian amici cannot attempt to cure New York's failure to introduce sufficient evidence to establish its claims through the introduction of such evidence in the guise of an amici brief.

Additionally, the proposed historian amici seek relief from the Court that is not requested by New York, the party that the amici claim to support. Proposed amici request that the Court "take whatever measures it deems necessary to ensure that the record is complete," suggesting that the Court might "remand the case to the Special Master with specific instructions concerning additional factfinding." (Proposed Historian Amici Brief at 29, and n.17). New York has made no such request, apparently aware

Proposed Amici's contention that the new evidence it seeks to introduce constitutes "the type of historical documents of which this Court has taken judicial notice in other original jurisdiction cases," (Proposed Historian Amici Brief at 7, n.5), is entirely unpersuasive. In *United States v. Louisiana*, 363 U.S. 1, 12-13 (1960), cited by proposed amici, the Court took judicial notice of historical documents "[b]oth sides ha[d] presented in support of their respective positions." Of course, where the parties have introduced evidence during the fact finding stage of an original action, and had a chance to analyze and respond to that evidence, its consideration by the Court is entirely appropriate. Proposed amici, on the other hand, seek to introduce an array of historical materials and expert opinions at the eleventh hour, without affording New Jersey the opportunity to subject the evidence to an appropriate level of scrutiny.

that it had already missed its opportunity to collect the evidence referred to by the proposed amici. Nor has New Jersey argued to this Court that further fact findings are necessary. After an extensive amount of discovery, the Special Master conducted exhaustive hearing in this matter over a period of six week during which both States presented numerous witnesses, scores of documents, and a complete array of historic evidence. Neither State has requested that that comprehensive process be repeated. The proposed historian amici should not be permitted to submit a request to this Court to the contrary.

The motions of the two other groups of proposed amici for leave to file briefs should also be denied. Three preservationist organizations calling themselves the "proposed New York landmarks amici," the New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council, and two other associations, the National Trust for Historic Preservation in the United States and the Municipal Art Society of New York, seek leave to file briefs in this matter. The proposed briefs would add little, if any, meaningful legal analysis to the issues to be addressed by the Court. Their motions, therefore, should be denied.

Notably, these five entities constituted a single amici group during the proceedings below, during which they participated at various stages. However, the organizations now seek to file two amici briefs before this Court, doubling the amount of pages of argument available to further their nearly identical special interests.

The brief of the National Trust for Historic Preservation and the Municipal Art Society is based entirely on the exceedingly unlikely hypothetical that the federal government might relinquish to private developers its ownership of and authority over one of the nation's most cherished landmarks. Not only do the proposed amici based their brief on this speculative scenario but they also request that New York be granted sovereignty over the entire Island on the specious argument that New Jersey cannot be trusted to preserve the historic buildings within its territory.

Additionally, proposed amici urge the Court to grant New York sovereignty over the filled portion of the Island based on a strained interpretation of Article III of the Compact. New York's exceptions make no claims based on Article III. To the contrary, New York's exceptions are limited to legal contentions concerning Article II of the Compact. The Special Master's interpretation of Article III has not, therefore, been challenged by the parties and is not before the Court. The proposed amici brief's focus on this provision of the Compact justifies its exclusion.

Proposed amici's arguments are based wholly on the premise that the federal government will transfer its title to and jurisdiction over the historic buildings on Ellis Island to a private developer and, presumably, in doing so will impose no duty on the developer to preserve those buildings. This premise is pure fantasy, as nothing in the record of this case or history of this nation suggests that the United States would abandon one of its most prominent national treasures.

As amici admit, as a matter of comity, the federal government currently consults both New Jersey and New York with respect to the preservation of buildings on Ellis Island. (Proposed Brief of National Trust amici at 11, n.6). Under this arrangement, the Main Building and some adjoining structures have been beautifully restored and opened to visitors. During the hearings in this matter nothing was introduced into the record to suggest that the federal government intends to abandon Ellis Island or refrain from its joint consultations with the States with respect to preservation should New Jersey's sovereignty be recognized by this Court. The proposed brief, therefore, adds little to the relevant legal issues to be decided by this Court.

In addition, amici take the specious position that only New York's laws are sufficient to allow entrustment with our nation's historic monuments. In so doing, proposed amici undertake a review of New Jersey's and New York's preservation laws, declaring those of New York to be superior. Based on this biased conclusion, amici assert that New York should be declared sovereign over the entire Island. Of course, amici's comparison of the preservation laws of the two States is wholly irrelevant to the issues to be decided in this case, as an interstate boundary cannot properly be determined on the basis of the historic preservation laws enacted by the States that share the boundary.

In addition, proposed amici predict that shared sovereignty on Ellis Island will result in impracticality and inconvenience. These predictions are entirely without support in

the record, a fact made apparent by amici's attempt to introduce evidence that was not offered by the parties during the hearings in this matter. (See Proposed Brief of National Trust amici at 10). As discussed above, amici briefs are not the appropriate vehicle for the introduction of evidence that a party to the underlying action failed to discover or introduce at trial.

Moreover, the so-called landmarks amici brief largely concerns legal concepts irrelevant to the issues to be decided in this matter. The proposed amici dedicate a significant portion of their brief to arguments concerning the extent of the limited jurisdiction granted to New York over certain waters and underwater land on New Jersey's side of the Hudson River boundary. Without convincing explanation, the proposed amici make a leap in logic to argue that the scope of this limited jurisdiction is relevant to historic preservation of buildings on the portion of Ellis Island created through fill after 1834. The filled portions of Ellis Island are neither water nor underwater land and whatever limited jurisdiction on New Jersey's side of the boundary may have been granted to New York in the Compact is wholly inapplicable to the historic structures on the portion of Ellis Island within New Jersey's sovereignty. As has been the case with arguments raised by other proposed amici, New York's exceptions do not address its purported authority to control historic preservation on the filled portions of the Island. The issue simply has not been raised by New York. Thus, the proposed landmarks amici brief adds nothing to

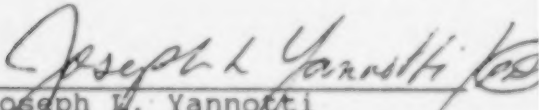
the legal issues relevant to this matter and should not be accepted by the Court.

CONCLUSION

For the reasons stated herein, New Jersey respectfully submits that the Court should deny the motions of proposed amici curiae for leave to file briefs in support of the exceptions of the State of New York.

Respectfully submitted,

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SEP 29 1997

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Supreme Court, U. S.
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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

**RESPONSE OF PROPOSED NEW YORK
LANDMARKS AMICI TO OBJECTIONS
OF THE STATE OF NEW JERSEY TO
MOTION FOR LEAVE TO FILE
BRIEF AS AMICI CURIAE**

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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**RESPONSE OF PROPOSED NEW YORK LANDMARKS
AMICI TO THE OBJECTIONS OF THE STATE OF NEW
JERSEY TO MOTION FOR LEAVE TO FILE
BRIEF AS *AMICI CURIAE***

The New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council (collectively, "Proposed New York Landmarks Amici" or "Proposed Amici") respectfully respond to the Objections of the State of New Jersey to their Motion for leave to file a brief as *amici curiae* (the "Landmarks Brief") in support of the State of New York's Exceptions to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R."). Proposed Amici seek to file the Landmarks Brief to proffer to the Court their expertise with respect to New York history and landmarks so as to aid the Court in addressing several of the novel issues raised by this original case. New Jersey opposes the filing of the Brief on the grounds that (1) the Special Master's interpretation of Article III, which Proposed Amici challenge, is "not before the Court" and (2) the Landmarks Brief addresses issues that are "irrelevant to the issues to be decided in this matter." (Objections at 6, 8.) New Jersey is wrong on both counts.

ARTICLE III IS BEFORE THE COURT

New Jersey's contention that Article III is not properly before this Court is utterly at odds with the record in this case. The Special Master's analysis and conclusions concerning Article III fill more than a dozen pages of the Report. (R. at 44-45, 56-60, 63-68, 77-80.) New York has expressly made its Article II arguments turn on a construction of Article III that differs significantly from that of the Special Master. (NY Br., Question Presented 1 (premising Article II argument on assumption that a "central purpose of the Compact was to confirm New York's control of commerce and navigation in New York Harbor.")) And New Jersey itself has taken great pains to embrace the Special Master's interpretation of Article III as vesting only limited jurisdiction in New York on the New Jersey side of the Article I boundary. (NJ Br. at 8-9.) Under such circumstances, it is difficult to understand how this Court can—to the extent that it does not find for New York on any other ground—avoid addressing the propriety of the Report's Article III conclusions.

Even if this were not the case, however, Proposed Amici would still not be precluded from making arguments based on Article III. Under Supreme Court Rule 37.1, which provides that an amicus brief should "bring relevant matter to the attention of the Court that has not already been brought to its attention by the parties," the scope of an amicus brief is not limited to the facts relied upon or the arguments made by the party in whose support the brief is filed. To the contrary, the Court has many times "rel[ied] on factual information, cases or analytical approaches provided only by an amicus." Robert L. Stern, *et al.*, *Supreme Court Practice* 564 (1993); *see, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987) (relying on amicus brief for information regarding Muslim religious practices); *Turner v. Safley*, 482 U.S. 78, 93, 95

(1987) (citing amicus brief in support of argument for prison mail regulation), *Maryland v. Craig*, 497 U.S. 836, 855-58 (1990) (relying on amicus brief for information concerning child abuse), *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 589 n.3 (1986) (dissent) (relying on amicus brief for facts concerning liquor industry pricing); *Elgin, J. & E. Ry. Co. v. Burley*, 327 U.S. 661, 669-75 (1946) (dissent) (citing arguments made by *amici curiae* concerning Railway Labor Act).

There is even greater reason to apply this liberal standard in a case over which the Court has original jurisdiction, like the present one, involving construction of an interstate compact. In an original jurisdiction case, unlike in a circuit court appeal or an appeal on *certiorari* to this Court, *all* of the findings and conclusions of the Special Master remain subject to *de novo* review, *see United States v. Maine*, 475 U.S. 89, 97-98 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984), so there can be no basis for a finding of appellate waiver. When the Court conducts (as it must) its own review of all the Report's conclusions, there should be no reason to exclude from consideration any amicus brief that would offer the Court "considerable help" with respect to any of these conclusions. Sup. Ct. Rule 37.1.

Adopting such a standard in this case is further warranted by the fact that the Compact of 1834 must, as even New Jersey concedes, "be interpreted as a whole so that all of its parts are harmonized" (NJ Br. at 31, citing *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 509 (1986).) Thorough consideration and understanding of the relationship among all of the various components of the Compact is necessary in order to settle on an appropriate approach to disposition. The Court should no more focus on certain Articles and exclude others than it should exclude from consideration related provisions in any case involving statutory construction. In this

context, an amicus brief, like the Landmarks Brief, which focuses on an Article not extensively evaluated by the parties, should prove of substantial assistance to the Court.

PROPOSED AMICI'S ARGUMENTS ARE RELEVANT

New Jersey's claim that the Landmarks Brief addresses issues that are "irrelevant" to the disposition of this case is equally unfounded. To the extent that the Court deems it necessary to reach Article III, coming to terms with the issues explored in the Landmarks Brief is essential to full resolution of the boundary dispute between New York and New Jersey. Indeed, as a matter of compact construction, that dispute turns entirely on the Compact's use of two terms—"property" and "jurisdiction." And it is to an analysis of contemporaneous understandings of these very terms to which the Landmarks Brief is chiefly dedicated.

Point I of the Landmarks Brief addresses a major flaw in the Report's analysis of the "exclusive right of property" granted to New Jersey by Article III. The Report equates this right of "property" in "underwater lands" with "sovereignty" over those underwater lands. However, the Report reaches this conclusion without taking into account abundant contemporaneous evidence that the Commissioners who drafted the Compact (1) understood that a State could have either "proprietary" or "sovereign" property rights in "underwater lands" and (2) used language in the Compact that demonstrates that all they intended to grant to New Jersey in the underwater lands surrounding Ellis Island was a "proprietary" right of property. The merits of Proposed Amici's argument as to this issue are for the Court to decide, but New Jersey cannot credibly contend that this argument is "irrelevant" to disposition of this case.

Point II of the Brief targets an even more significant gap in the Report's conclusions. The Report concludes simply and bluntly that New Jersey has "sovereignty" over

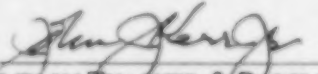
Ellis Island and the western half of the Hudson River. At the same time, however, the Report acknowledges that Article III permits New York to retain some measure of residual jurisdiction on the New Jersey side of the Article I boundary. The Special Master several times alludes to this jurisdiction as "limited," "legal," and, most significantly, as "police" jurisdiction, but the Report makes no effort to further circumscribe its scope, or determine its relationship to New Jersey's purportedly "sovereign" powers, over the underwater lands in the vicinity of Ellis Island.

The Report's failure to address this issue is of particular significance to the Proposed Amici because what the Report acknowledges to be New York's "police jurisdiction" on the New Jersey side of the Article I boundary line is, in Proposed Amici's view, enough to give New York jurisdiction over, *inter alia*, "historic preservation" matters on the New Jersey side of the boundary. The merits of this argument are, once again, for the Court to decide, but the fact remains that resolution of this question is both relevant to this case and essential to full adjudication of the New York-New Jersey boundary dispute. Indeed, the very fact that New Jersey now feels compelled to take issue with Proposed Amici's view of the scope of New York's residual jurisdiction demonstrates that (a) this issue has not been definitively addressed by the Report and (b) there remains room for disagreement as to its proper resolution. Under such circumstances, it is difficult to understand how it can be claimed that the Report facilitates a full resolution of the dispute when an issue of such potential significance remains unresolved. The Landmarks Brief undertakes to fill this gap in the Report's conclusions and urges the Court to do the same.

WHEREFORE, the Proposed New York Landmarks Amici respectfully request that New Jersey's Objections be overruled and their motion for leave to file the Landmarks Brief as *amici curiae* be granted in its entirety.

Dated: New York, New York
August 20, 1997

JOHN J. KERR, JR.
Counsel of Record


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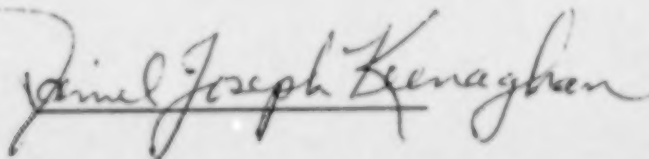
I hereby certify that the annexed Response of *Amici Curiae* New York Landmarks Conservancy, Preservation League of New York State, and Historic Districts Council to Objections of The State of New Jersey to Motion for Leave to File Brief as *Amici Curiae* was served via U.S. Mail on August 20, 1997, upon the following counsel of record:

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A handwritten signature in cursive script, reading "Daniel Joseph Kenaghan". The signature is written in dark ink and is positioned at the bottom right of the page.